PP

v.

ZULKIFLI ARSHAD

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL TRIAL NOS: 45-22-2001 & 45-23-2001]
23 APRIL 2004

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - 5796.7 g & 3867.2 g cannabis - Evidence of chemist, whether admissible - Crucial aspects of prosecution case, whether challenged by defence - Actual possession, whether proved - Large quantity of drugs involved, whether inference against personal consumption or passive possession - Charge against accused, whether proved*

The police caught the accused with 6 slabs of plant material found in a black bag on the rear passenger seat of a car ('the car') occupied by him. Subsequently the police were led to a house ('the house') in which 4 other slabs of the same plant material were found therein. The keys to the house were found on the accused. The accused was then charged with the offence of trafficking in dangerous drugs on two counts, *ie*, 5796.7 grams thereof found in the car and 3867.2 grams thereof found in the house. Both counts were under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') which carried the mandatory death sentence under s. 39B(2) of the Act.

The issues were: (1) whether the evidence of the government chemist that the said plant material was cannabis could be accepted as there was no evidence to show that 10% of the total weight of the 10 slabs thereof were tested; (2) whether the defence challenged crucial aspects of the prosecution case; (3) whether actual possession of the drugs were proved; (4) whether the large quantity of the drug involved gave an inference against personal consumption or passive possession; and (4) whether the defence cast a reasonable doubt on the prosecution case.

Held (convicting and sentencing the accused):

[1] The government chemist used analytical methods approved by the Court of Appeal in the case of *Wan Mohd Kamil Wan Mohd v PP*. In every respect, the government chemist had carried out all analytical tests that in the considered view of the Court of Appeal in that case amounted to a detailed analysis of the plant material. The evidence of the government chemist could not be faulted. The cross-examination had not cast any doubt on the weight of the cannabis stated by the government chemist. It was proved beyond reasonable doubt that the 10 slabs of plant material were indeed cannabis as defined in s. 2 of the Act and were indeed of the weight stated in the charges. (p 655 f)

[2] The defence did not challenge all crucial aspects of the prosecution case. It is settled that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony or tantamount to accepting the truth of the witness' testimony. But in truth, in the instant case, in so far as solid proof on all crucial aspects was concerned, it would not really have mattered even if the prosecution story was challenged. It was clearly proved that the accused was the sole occupant of the car and that the black bag and contents of cannabis were on the rear passenger seat of the same car that belonged to him. It was clearly proved that the accused had the custody and control of the car at the material time given the undisputed evidence that the accused was the sole occupant and was seated on the driver seat of a car with its engine running at the material time. It was also clearly proved that cannabis was recovered from the house that was under the sole control and management of the accused. (pp 657 a & 660 b-e)

[3] The prosecution had not only proved actual possession of the drugs found in the car under the custody and control of the accused but also proved the concurrent presence and possession of drugs found in the house under the custody and control of the accused. And this was a joint trial where the evidence on record was to be viewed and considered in totality and as a whole in relation to both trafficking charges and to the question of whether it was just passive possession. (pp 661 e-f)

[3a] The quantities of drugs involved were respectively more than 25 times and 15 times the minimum requirement, thus attracting the statutory presumption of trafficking. Given so, the inference must be preponderantly against personal consumption or passive possession. But it was not only on account of the weight of the drugs that the inference must be against personal consumption or passive possession. A further telling piece of

evidence against personal consumption or passive possession was the undisputed fact that the drugs were found in an empty house. Apart from the above, the total conduct of the accused at the material time was consistent with guilty knowledge rather than the absence thereof. (pp 665 d & 666 h)

[4] The defence raised by the accused was unquestionably introduced only at the stage of the defence and not put at all or even vaguely intimated at the stage of the prosecution case. Further, the accused gave an account that was inconsistent with the unchallenged facts presented by the prosecution. Also, the prosecution successfully adduced rebuttal evidence to meet the defence of the accused. It followed, therefore, that the accused failed to cast a reasonable doubt on the prosecution case. (pp 677 b & 680 f)

[5] There was no gap in the prosecution case. There was no doubt that the accused was trafficking. The prosecution had proved that it could not have been anything else, beyond all reasonable doubt. All evaluation of the prosecution case and then of the defence gave the same result. Accordingly, on both counts, the accused should be convicted and sentenced to death. (p 688 g)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen [1995] 3 CLJ 639 CA ***(refd)***
Alcontara Ambrose Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Au Ah Lin v. PP [1963] 1 MLJ 365 ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Chua Beow Huat v. PP [1970] 2 MLJ 29 ***(refd)***
Jacob v. PP [1948-1949] Supp MLJ 20 ***(refd)***
K Saravanan v. PP [2002] 4 CLJ 144 CA ***(refd)***
Lee Ing Chin v. Gan Yook Chin [2003] 2 CLJ 19 CA ***(refd)***
Loo Kia Ming v. PP [2000] 3 CLJ 653 CA ***(refd)***
Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin & Anor [1997] 2 CLJ 752 CA ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Mohan Singh Lachman Singh v. PP [2002] 3 CLJ 293 CA ***(refd)***
Muhamad Safarudin Baba & Anor v. PP [2002] 4 CLJ 210 CA ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
Phon Nam v. PP [1991] 2 CLJ 1467; [1991] 1 CLJ (Rep) 381 SC ***(refd)***
PP v. Abang Abdul Rahman [1982] 1 MLJ 346 ***(refd)***
PP v. Abdul Hamid [1969] 1 MLJ 53 ***(refd)***
PP v. Abdul Rahim Abdul Satar [1990] 1 CLJ 840; [1990] 3 CLJ (Rep) 1 HC ***(refd)***
PP v. Cheng Meng Bong & Ors [1966] 1 MLJ 237 ***(refd)***
PP v. Chow Kam Meng [2001] 7 CLJ 387 HC ***(refd)***

PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 MLJ 180 ***(refd)***
PP v. Kenneth Fook Mun Lee [2002] 2 MLJ 563 ***(refd)***
PP v. Kesavan Petchayo [2001] 7 MLJ 144 ***(refd)***
PP v. Lee Beng Siang [1991] 3 CLJ 2927; [1991] 3 CLJ (Rep) 584 HC ***(refd)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Amin Mohd Razali & Ors [2002] 5 CLJ 281 HC ***(refd)***
PP v. Phon Nam [1987] 2 MLJ 262 ***(refd)***
PP v. Phon Nam [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 SC ***(refd)***
PP v. Rosman Ismail [2003] 5 CLJ 139 HC ***(refd)***
PP v. Saimin & Ors [1971] 2 MLH 16 ***(refd)***
PP v. Samsul Kamar Mohd Zain [1988] 1 CLJ 542; [1988] 2 CLJ (Rep) 310 HC ***(refd)***
PP v. Tan Ann Chye [2003] 5 MLJ 1 ***(refd)***
Ramli Kechik v. PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC ***(refd)***
Roslim Harun v. PP [1994] 2 CLJ 486 SC ***(refd)***
Re Adam Aman; Hoeson Ghani v. PP [1958] 24 MLJ 229 ***(refd)***
Saminathan & Ors v. PP [1955] MLJ 121 ***(refd)***
Saul Hamid Pakir Mohamad v. Inspector Abdul Fatah Abdul Rahman & Anor [1999] 6 MLJ 800 ***(refd)***
Tan Khoon v. PP [1992] 2 MLJ 132 ***(refd)***
Teoh Hoe Chye v. PP [1987] 1 MLJ 220 ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
Wan Mohd Kamil Wan Mohamad v. PP [2003] 1 CLJ 665 CA ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Yusmarin Samsudin v. PP [1999] 4 CLJ 391 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 182A, 425
Dangerous Drugs Act 1952, ss. 2, 37(j), 39B(1)(a), 39B(2)
Excise Act 1961, s. 61

Other source(s) referred to:
Hamid's Criminal Procedure, 2nd edn, pp 1052-1053, 1056
Mallal's Criminal Procedure, 5th edn, para 15527

For the accused - Suzana Norlihan Alias; M/s Suzana Norlihan & Co
For the prosecution - Haslinda Abu Bakar, AG's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:
In both trials, the accused faces a capital charge, which reads respectively as follows.

Bahawa kamu pada 27 Januari jam lebih kurang 1.00 pagi di dalam kereta pendaftaran JCQ 2852 di tepi Kilang Sharp-Roxy, km 10 Jalan Kluang, Sri Gading, Batu Pahat, di dalam daerah Batu Pahat, di dalam Negeri Johor Darul Ta'zim, bagi pihak diri kamu sendiri atau bagi pihak sesiapa telah didapati mengedar dadah berbahaya, sejumlah berat 5,796.7 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Bahawa kamu pada 27 Januari jam lebih kurang 1.30 pagi di rumah bahagian tengah, rumah teres tiga pintu beralamat PS 31-3, Parit Sengkuang, Jalan Kluang, Sri Gading, di dalam daerah batu Pahat, di dalam Negeri Johor Darul Ta'zim, bagi pihak diri kamu sendiri atau bagi pihak sesiapa telah didapati mengedar dadah berbahaya, sejumlah berat 3,867.2 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

11 witnesses testified for the prosecution. Stated briefly, the testimony of the police witnesses may be summarised as follows. At 0010 hours on 27 January 2001, Chief Inspector Ramesh a/l Nagayan (SP7) first briefed 9 police officers and men, and then instructed those 9 officers and men to take ambush positions at the 9.5km, 10 km and 10.5 km Jalan Kluang, Batu Pahat. At 0035 hours, SP7 and the others proceeded to their assigned positions. Corporal Jayarajan a/l Philip Sundram (SP10) was assigned to follow SP7 – "Saya bersama Kpl Jayarajan akan pergi ke tempat sebuah kereta bernombor JCQ 2852 … Saya dan Kpl Jayarajan akan ambil tempat di tepi kilang Sharp-Roxy di km 10 Jalan Kluang ke Batu Pahat". SP7 testified that at the very moment he arrived by the side of the Sharp-Roxy factory, he saw a car bearing registration number JCQ 2852 parked beside the public telephones outside the Sharp-Roxy factory (for that factory and telephone booths, see photographs P11(1-3)). That car was facing Jalan Kluang. There were no other cars in the vicinity. There was no one in the vicinity. SP7 and SP10 approached that car from the rear. SP7 halted his car about 1-2 metres from JCQ 2852. SP7 ordered SP10 to enter JCQ 2852 by the front passenger door.At the same time, SP7 proceeded to the driver door. A male Malay (later identified as the accused) was seated on the driver seat. The accused was the only person inside JCQ 2852, which was stationary but had its engine running. The driver door window was open. SP10 entered JCQ 2852 by the front passenger door. Meantime, SP7 had inserted his hand into JCQ 2852 and removed the ignition keys (P6D). SP7 identified himself to the accused. According to SP7, "OKT cuba membuka pintu pemandu tetapi Jayarajan dapat menahannya". According to SP10, after SP7 had identified himself "lelaki itu cuba membuka pintu pemandu, macam nak larikan diri. Saya terus pegang tangan lelaki itu". SP7 opened the driver door and ordered the accused to alight from JCQ 2852. The accused alighted from JCQ 2852. SP10 also alighted from the car and then stood guard over the accused.

SP10 stood next to the accused. SP7 frisked the accused. Nothing incriminating was found on the body of the accused. SP7 searched JCQ 2852. There was a black bag, embossed "Nike AEG", on the rear passenger seat. SP7 placed that black bag (P6) on the road, near JCQ 2852, near the driver door and near the accused. SP7 proceeded to unzip the black bag. At that moment, the accused attempted to escape. According to SP7, "SP10 dapat menangkap, dan berlaku sedikit pergelutan", and that he helped SP10 to apprehend the accused. According to SP10, "ketika itu OKT tolak saya dan cuba melarikan diri. Saya terus pegang bahagian leher OKT, dan saya and OKT telah jatuh di atas jalan. Seterusnya SP7 telah bantu saya untuk memegang OKT. Kami berjaya tahan OKT. OKT tidak jaya beralih dari tempat berdiri asal". Then SP7 searched the black bag. SP7 found 6 compressed slabs of a plant material wrapped in translucent plastic (the plastic wrappers were marked as P5B (1-6) while the plant material were marked as P5S (1-6)). At the bottom of the black bag were newsprint "Utusan Malaysia" (P6B2) dated 9 January 2001 (P6B2). The accused witnessed the search. SP7 ordered SP10 to handcuff the accused. SP7 then telephoned the other officers and men at the other ambush positions to come to the scene. When all officers and men had gathered at the scene, SP7 and Inspectors Balan and Arshad searched JCQ2852. Nothing incriminating was further found in JCQ 2852. SP7 questioned the accused. The accused replied. Thereafter, all police officers and men, and accused, proceeded to house PS31-3, Parit Sengkuang, Jalan Kluang, Batu Pahat. At 0150 hours, the entire police party and accused arrived at PS31-3. SP7 removed a set of keys (P8C) from the front left pocket of the jeans worn by the accused. SP7 instructed Corporals Manoharan and Nordin to position themselves behind PS31-3. SP7 opened the front doors with P8C. It was dark. SP7 switched on the lights. There were no occupants inside PS31-3. The guest hall was completely bare. It was an empty house. The doors of the 1st and 2nd bedrooms were ajar. The 1st and 2nd bedrooms were completely bare. The door of the 3rd bedroom was locked. SP7 opened that door with P8C. In one corner of the 3rd bedroom was a large grey plastic sheet (P6A). Underneath that grey plastic sheet were 4 compressed slabs of a plant material wrapped in translucent plastic (the plastic wrapper were marked as P7B (1-4) while the plant material were marked as P7S (1-4)). Beneath those 4 slabs were newsprint "Star Section 2" dated 4 December 2000 (P6B1). 2 slabs had one of its 4 corners cut off. The whole house was then searched. Nothing incriminating was further found in PS31-3. The back doors of PS31-3 were locked. SP7 relocked the 3rd bedroom and the front doors of PS31-3. The entire police party and accused then proceeded to the Sri Gading Police Station. There, SP7 lodged his reports, and prepared the search lists. Thereafter, the entire police party and accused proceeded to the Batu Pahat Police Station. There, SP7 prepared his handing-over lists. SP7 handed the accused and exhibits to the investigation officer (SP11 – Assistant

Superintendent of Police Abdul Wahid). The next day (28 January 2001), SP7 and SP11, and 2 other officers proceeded to PS31-3. With P8C, SP11 opened the front doors. There were no occupants inside PS31-3. With P8C, SP11 opened the door of the 3rd bedroom. PS31-3 was an empty house. It was the testimony of SP7 that the black bag and its contents (6 slabs of plant material and newsprint), and grey plastic sheet, 4 slabs of plant material and newsprint were in his constant and unbroken possession from the moment of its discovery until its handing over to SP11.

Meanwhile, SP3 (Goo Kwa Leng) testified that he was the owner of PS31-3, and that in mid January 2001 he rented out PS31-3 to the accused. The accused paid a month's rent and a two months' deposit. He gave a set of house keys to the accused in mid January 2001. He cleaned the entire house before he rented it to the accused. "Semasa saya sewakan, rumah itu ada dalam keadaan kosong, lapang. Saya bersih satu rumah. Saya kunci balik rumah selepas bersihkannya. Saya kuncikan semua pintu." SP3 testified that he did not enter the house after it was rented out to the accused. Under cross-examination, SP3 said that he cleaned the house as the accused had said he (accused) wanted to rent the house – "Saya bersihkan sebab OKT memberitahu dia ingin sewa". The accused did not say when he would actually enter PS31-3. There were tenants prior to the accused. Those former tenants had returned the house keys to him. Under re-examination, SP3 testified that PS31-3 was vacant for a month prior to it being rented out to the accused. When he cleaned the house, he found that his former tenants had not left anything behind.

Another civilian witness was SP4 (Jamari bin Diron) who testified that he was at one time the owner of JCQ 2852. In mid 1999, he handed JCQ 2852 for sale to a car salesman (SP6 – Azhari bin Harun). He signed the transfer form. A few months later, SP6 informed him that he (SP6) had secured a purchaser, the accused. But the change of ownership was not effected. SP6 handed RM2,000 to him. SP6 said that the purchaser was his close friend and that he (SP6) would guarantee full payment. In early 2000, he met the accused. He said to the accused that his payments had fallen into arrears. "Saya kenali OKT sebab dia guna kereta saya." The accused said he would settle the arrears. "Bayaran ada dijelaskan." "Ada sekali saya berjumpa OKT di rumah OKT. Saya pergi jumpa tentang bayaran kereta. OKT kata dia akan menjelaskan. OKT ada menjelaskan bayaran. Saya jumpa OKT pada pertengahan 2000." When he met the accused, he (accused) had JCQ 2852 with him. He did not use JCQ 2852 after it was handed to SP6. He did not leave anything behind in JCQ 2852. Under cross-examination, SP4 testified that he did not know the accused prior to the sale of his car. "Saya tahu siapa Zulkifli selepas saya melihat OKT membawa kereta saya." SP6 informed him that the purchaser was

one Zulkifli. "Saya tidak tahu samada Azhari pernah menguna kereta saya selepas saya serahkan kereta saya kepada Azhari." Under re-examination, SP4 testified that he had not seen SP6 using JCQ 2852. "Setiap kali saya jumpa OKT saya melihat kereta saya bersama OKT."

The last civilian witness was SP6, who affirmed that SP4 handed JCQ 2852 to him in mid 1999. He sold JCQ 2852 to his neighbour, the accused. The accused paid RM2,000. In September 1999, he handed JCQ 2852 to the accused. He informed SP4 of the identity of the purchaser. "Belum tukar nama." SP4 complained that payments had fallen into arrears. He asked the accused to settle the arrears. He did not leave anything inside JCQ 2852. He did not use JCQ 2852 after it was handed to the accused. From September 1999 to January 2001, the accused was the sole user of JCQ 2852. Under cross-examination, SP6 said that in 1991/1992 he was convicted of an offence punishable under s. 15 of the Dangerous Drugs Act 1952.

As to the identity and weight of those 10 slabs of plant material, a government chemist (SP9 – Shadiah bte Mohammad) testified that she individually weighed and analysed each of the 10 compressed slabs of plant material. "Proses pertama adalah mendapat berat bersih. Saya timbang satu per satu … saya mencerai-ceraikan satu mampatan per satu mampatan … bahan dari satu mampatan tidak di campur dengan bahan dari mampatan lain … Saya membuat analisa berasingan. Saya siap semua analisa pada satu mampatan sebelum mula dengan mampatan kedua dan seterusnya." SP9 testified that she carried out the same 4 analytical tests on all 10 slabs, and that those 4 tests were, (i) physical or visual examination, (ii) microscopic examination, (iii) Duquenois-Levine test (DLT), and, (iv) thin layer chromatography test (TLC). "Untuk Ujian (i) saya mengguna mata melihat dengan magnifying glass keatas 100% bahan tumbuhan yang telah dicerai-ceraikan tadi. Saya dapati tumbuhan tersebut adalan sama jenis, tidak ada bahan asing, dan mempunyai ciri-ciri cannabis. Ciri-ciri botani yang saya lihat ada bagi cannabis, seperti batang, daun, bunga dan biji." "Dari ujian (i) kesimpulan saya adalah bahan tersebut adalah sama dengan ciri-ciri cannabis seperti yang di tarifkan di s. 2 Akta Dadah Berbahaya 1952." "Selepas selesai ujian (i) saya jalankan dengan ujian (ii) … saya telah jalankan ujian (ii) keatas 100% bahan tumbuhan tersebut. Saya dapati ciri-ciri" morfology bagi genus cannabis, seperti cystholic hairs dan simple hairs dan juga terdapat resin pada bahan tumbuhan tersebut. Kesimpulan saya, bahan tumbuhan ini sama seperti ciri genus cannabis seperti yang seperti yang di tarifkan di s. 2 Akta Dadah Berbahaya 1952." SP9 related that all other plant material do not possess the characteristics of cystholic hairs and simple hairs, and resin. SP9 then related that the 3rd and 4th tests are chemical tests. "Untuk manjalankan ujian 3 dan 4, saya mengambil 32 random samples. Saya ada timbang setiap

contoh. Untuk satu contoh saya ambil lebih dari 1 gram. Ujian 3 menunjukkan hasil positif bagi setiap contoh. Ini menunjukkan kehadiran resin dalam genus cannabis yang terdiri daripada bahan aktif cannabinoid. Ia memberi warna purple. Lain benda tidak menunjukkan warna purple. Ujian 4 menunjukkan hasil positif, ia itu mengesahakan genus resin yang terdiri daripada bahan aktif cannabinoid … seperti tetra hydrocannabinol, cannabinol, cannabidiol ... (yang cuma terdapat) dalam resin cannabis sahaja. Keempat-empat ujian mengesahkan ia adalah cannabis seperti yang di tarifkan di s. 2 Akta sama." SP9 said that it was not necessary to test 10% of the weight of the plant material. The 32 random samples taken from each slab were sufficient to establish the identity of the plant material. She said that tests 3 & 4 are highly sensitive tests, and that a small quantity of sample is sufficient to carry out tests 3 & 4. In short, it was the testimony of the chemist that there was a visual and microscopic examination of the entire plant material after it had been loosened up, and that cystholic hairs and simple hairs and resin, the characteristics of cannabis and cannabis alone, were observed in both visual and microscopic examination. It was the testimony of the chemist that a total of 32 samples were taken from each slab of plant material to perform the Duquenois-Levine and thin layer chromatography tests, and that there was a positive result from each test conducted. It was the testimony of the chemist that all 10 slabs of plant material were cannabis within the meaning of s. 2 of the Dangerous Drugs Act 1952 (Act), and that the weight of the said 6 slabs from the black bag was 5,796.7 grams while the weight of the 4 slabs of plant material from the 3rd bedroom of PS31-3 was 3,867.2 grams.

Miss Suzana Norlihan for the accused pointed out that there was no evidence that 10% of the total weight of the 10 slabs were tested. She contended that the weight of cannabis was not proved. She was referring, but of course to *Loo Kia Ming v. PP* [2000] 3 CLJ 653, where it was held by the Court of Appeal that by virtue of s. 37(j) of the Act, it is incumbent for a chemist to test a minimum of 10% of the drug. But *Loo Kia Ming* is not the only Court of Appeal authority on the quantity of drugs to be chemically tested. In *Wan Mohd Kamil bin Wan Mohamad v. PP* [2003] 1 CLJ 665, where the evidence of the chemist was also attacked, the Court of Appeal held that the chemist, by physical examination and microscopic examination of the entire plant material and by Duquenois-Levine and thin layer chromatography tests performed on 32 samples taken from the bulk of the plant material, "had carried out a detailed analysis of the plant material" and that "the evidence given by the chemist cannot be faulted". PS Gill JCA (as he then was) said as follows:

At this hearing of the appeal before us, counsel for the appellant raised a number of issues. However, two pertinent issues worthy of consideration are, firstly, that the trial judge was wrong in accepting the evidence of the chemist PW4, and secondly, that the trial judge was wrong in invoking, the presumption of trafficking upon a presumption of possession of ganja, thereby seriously misdirecting himself in law.

In respect of the issue of the evidence of the chemist, he stated that he conducted a separate analysis of the content of the packets marked as 'A' and 'A1' which were handed to him by Ketua Inspektor Abdul Razak bin Hassan. In his evidence, he stated:

I conducted separate analysis on the two packets, ie 'A' and 'A1'. For packet 'A' what I did were as follows:

(1) I obtained the net weight of the slab of the compressed plant material. I then loosen up completely the compressed plant material to carry out the physical examination on all the plant material. I found all the plant material to belong to one type similar to cannabis. No foreign material in it.

(2) I then carried out microscopic examination on all the plant material and found all of them to bear the characteristic features of cannabis. They are:

(i) cystolith hairs;

(ii) simple hairs;

(iii) grandular hairs; and

(iv) abundance resin at their natural state.

My conclusion after the two examinations is that the entire plant is from genus cannabis.

I, after that, took 32 random samples from the bulk of the plant material to perform the Duquenois-Levine (DLT) Test and Thin Layer Chomotrophy (TLC). The purpose of the two tests is to detect the presence of cannabinoid in the resin that I observed in all the plant material. From the two tests that I did, I concluded that cannabinoid were present. Therefore I conclude that all the plant material from the compressed in 'A', is cannabis as defined under s. 2 of the (Dangerous Drugs Act 1952) DDA 1952.

Similar analysis was carried out from the compressed slab plant material marked 'A1'. I obtained the same result that they were cannabis as defined under s. 2 of the DDA 1952.

Cannabinoid are the active ingredient of cannabis. After the physical and microscopic examination, I have concluded that all the plant material were of genus cannabis. There was only one type of plant material. So if any part of the plant material is found to be cannabis as defined under s. 2 of the DDA, the entire bulk must be the same. Therefore there is no necessity to subject the entire plant materials for the DLT and TLC test.

We observed that the chemist took representative samples at random from the different parts of the impugned drugs in packages 'A and 'A1' for analysis. We are of the view that the facts in the case of *Leong Bon Huat v. Public Prosecutor* [1993] 3 MLJ 11 referred to us by appellant's counsel are distinguishable, as in that case, the chemist stated that out of the total amount of cannabis weighing 793.85g, he merely took representative samples of 79.30g for analysis, leaving the balance of the cannabis not analysed.

It is clear that the chemist carried out a detailed analysis of the plant contained in the two packets and he testified positively that the result of his test showed that the plant material examined by him was cannabis as defined under s. 2 of the Act.

It is our considered view, the evidence given by the chemist was satisfactory and cannot be faulted. In the premise, we hold that the appeal on this issue is without merit.

Indeed, while it was said in *Leong Bon Huat* that there should be chemical tests on "adequate quantities of plant material", it was also said by the Supreme Court per Edgar Joseph Jr. SCJ that "what would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the tests were adequate, having regard to the total weight of the plant material, for the reason stated". Attention should also be called to the fact that although the chemist in *Leong Bon Huat* did say that he conducted a physical examination of the plant material, he failed however to mention the result of his physical examination (see *Leong Bon Huat,* 14, 15). But there was no such malady in the evidence of the chemist in the instant case (for an analogy, see *Roslim bin Harun v. PP* [1994] 2 CLJ 486). SP9 testified "Untuk Ujian (i) saya menguna mata melihat dengan magnifying glass keatas 100% bahan tumbuhan yang telah dicerai-ceraikan tadi. Saya dapati tumbuhan tersebut adalan sama jenis, tidak ada bahan asing, dam mempunyai ciri-ciri cannabis. Ciri-ciri botani yang saya lihat ada bagi cannabis, seperti batang, daun, bunga dan biji." "Dari ujian (i) kesimpulan saya adalah bahan tersebut adalah sama dengan ciri-ciri cannabis seperti yang di tarifkan di s. 2 Akta Dadah Berbahaya 1952." "Selepas selesai ujian (i) saya jalankan dengan ujian (ii) … saya telah jalankan

unjian (ii) keatas 100% bahan tumbuhan tersebut. Saya dapati ciri-ciri" morfology bagi genus cannabis, seperti cystholic hairs dan simple hairs dan juga terdapat resin pada bahan tumbuhan tersebut. Kesimpulan saya, bahan tumbuhan ini sama seperti ceri genus cannabis seperti yang seperti yang di tarifkan di s. 2 Akta Dadah Berbahaya 1952."

Section 37(j) of the Act applies only where there are a number of receptacles. Plastic wrappers are hardly receptacles. And even if s. 37(j) were applicable, it had not been settled that 10% of the weight must be tested. In *Au Ah Lin v. PP* [1963] 1 MLJ 365, the second ground of appeal was that there was non-compliance with the provisions of s. 61 of the Excise Act 1961 which read as follows:

> When any goods suspected of being dutiable or otherwise liable to seizure have been seized, it shall be sufficient to open, examine, and if necessary to test the contents of ten per centum only of each description of package or receptacle in which such goods are contained, and the Court shall presume that the goods contained, in the unopened packages or receptacles are of the same nature, quantity and quality as those found in the similar packages or receptacles which have been opened.

The opinion of the Federal Court consisting of a most formidable panel of Judges, Thompson LP, Wee Chong Jin CJ (Singapore) and Wylie CJ (Borneo), was categorical:

> In our view, that ground of appeal is based on a misapprehension. It is quite clear that the Revenue Officers took possession of either all or part of the contents of every container alleged to contain excisable liquor. The amount of the sample is not in evidence in every instance.
>
> In our view section 61 does not require that samples be taken of the contents of every package or container which is in question. The samples shall be 10% of the packages or containers and when that is done the presumption mentioned in the section as to the contents of all the packages arises. In our view the section does not require the taking of any particular quantity. That is abundantly clear on the reading of the section itself. The words "ten per centum" refer to the packages, not to the contents of each package.

Au Ah Lin concerned a provision under the Excise Act 1961 but nonetheless was applied in prosecutions under the Customs Act 1967 (see *Tan Khoon Eng v. PP* [1992] 2 MLJ 132, and *PP v. Cheng Meng Bong & Ors* [1966] 1 MLJ 237) and under the Dangerous Drugs Act 1952 (see *PP v. Lee Beng Siang* [1991] 3 CLJ 2927; [1991] 3 CLJ (Rep) 584). In particular, in *Teoh Hoe Chye v. PP, Yeap Teong Tean v. PP* [1987] 1 MLJ 220, which concerned a drug trafficking offence and where the evidence of the chemist was questioned, it was held at first instance by Mohamed Dzaiddin J (as he then was) as follows:

> Lastly, on the question of the unsatisfactory evidence of the Chemist, PW1, I must reiterate that I accepted his evidence. In *Au Ah Lin v. Public Prosecutor* [1963] MLJ 365 Thomson LP held that the kind of provision with which we were dealing here did not require that samples be taken from the contents of every package or container in question. There was also no requirement of the taking of any particular quantity and that the words "ten percentum" referred to the package and not to the contents of each package.

That most astute observation of Mohamed Dzaiddin J was not taken up in the appeal, and in the upshot was overlooked in the appeal.

The contrary opinion was expressed in *PP v. Tan Ann Chye* [2003] 5 MLJ 1, and in *PP v. Rosman bin Ismail* [2003] 5 CLJ 139 where *Loo Kia Meng* was followed. But *Loo Kia Meng* was not followed in *PP v. Chow Kam Meng* [2001] 7 CLJ 387, where it was held by Abdul Wahab Patail J that "s. 37(j) clearly requires not 10% of the weight of the plant material in each of the slabs wrapped in plastic to be used up as samples, but to 10% of the number of slabs" and that Loo Kia Meng which had not considered the Supreme Court decision in *Roslim bin Harun v. PP* [1994] 2 CLJ 486 SC and "is not good authority". All the same, as said, s. 37(j) was not applicable. And even if s. 37(j) were applicable, *Loo Kia Meng* is not the only superior authority on the issue. Besides *Wan Mohd Kamil*, there is *K Saravanan v. PP* [2002] 4 CLJ 144, where it was held by the Court of Appeal per Mohd Noor Ahmad JCA that the chemist who tested random 32 samples had clearly complied with the provisions of s. 37(j).

Quite evidently, SP9 used analytical methods approved most recently by the Court of Appeal in *Wan Mohd Kamil*. In every respect, SP9 had carried out all analytical tests that in the considered view of the Court of Appeal in Wan Mohd Kamil amounted to a detailed analysis of the plant material. The evidence of SP9 could not be faulted. Cross-examination had not cast any doubt on the weight of cannabis stated by SP9. It was proved beyond all doubt that the 10 slabs of plant material were indeed cannabis as defined in s. 2, and were indeed of the weight stated in the charges.

It was also contended that the prosecution had not proved exclusive possession of the black bag and contents, on the basis, so it was argued, (i) that the prosecution failed to prove the length of time that the accused was inside JCQ 2852 before the ambush, (ii) that SP7 and SP10 could not say that the accused was the only person inside JCQ 2852 before the ambush, (iii) that the prosecution could not prove the length of time that the black bag and contents were inside JCQ 2852 before the ambush, and, (iv) that the prosecution failed to prove that all doors of JCQ 2852 were locked and that all windows of JCQ 2852 were closed. But it was forgotten altogether that it was incontrovertibly

proved that the accused was the only occupant of JCQ 2852 and that the said black bag and contents of 5,796.7 grams of cannabis was on the back seat of JCQ 2852, at the material time. It could be said that it was so incontrovertibly proved, as the entire testimony of SP7 and SP10 on that most crucial aspects of the prosecution case was not challenged at all by the defence. SP7 was cross-examined on the clothing worn by SP7 and SP10, on the possibility of there being another occupant in JCQ 2852 prior to the ambush, on the operating hours of the Sharp-Roxy factory, and, on the guardhouse at the Sharp-Roxy factory and the persons that could be at the guardhouse. SP7 was asked by defence counsel to confirm, which he did, that he (SP7) could remove the ignition key even when with the engine of JCQ 2852 still running, that SP10 could enter JCQ 2852, and that SP10 entered JCQ 2852 "dalam keadaan terkejut". And defence counsel challenged SP7's testimony that the accused attempted to flee from the scene. But that was all there was to it in the cross-examination of SP7.

The cross-examination of SP10 also left untouched the prosecution story that the accused was the sole occupant of JCQ 2852 at the material time. SP10 agreed that he could not say if there was another occupant in JCQ 2852 prior to his arrival at the scene. SP10 said that he did not know the length of time that JCQ 2852 had been at the scene, and that he did not know whether the accused was asleep inside JCQ 2852. SP10 said he entered JCQ 2852 "macam biasa". SP10 agreed that SP7 "ambil kunci kereta dengan cepat dan mengejut". SP10 disagreed with the suggestion that the accused wanted to retrieve the ignition keys from SP7, and not to flee. SP10 disagreed with the suggestion "OKT cuba melarikan diri sebab dia tidak tahu kamu adalah siapa". SP10 agreed that he released the arm of the accused, when the accused alighted from JCQ 2852, and that the accused did not dash out from JCQ 2852. SP10 disagreed with the suggestion that the accused could have fled from the scene, if the accused had intention to do so, at the very instance that the accused was outside JCQ 2852. SP10 agreed that he did not speak to the accused. SP10 was questioned as to the manner in which he stood guard over the accused. SP10 agreed that both accused and him had full view of SP7. SP10 was questioned on the manner in which the accused had pushed him. SP10 replied that the accused pushed him with both hands. SP10 was questioned as to how it got to be that both him and accused ended up on ground. SP10 replied "sama hilang balance, dia tolak saya dan saya paut dia". SP10 was asked whether he identified the black bag "berdasar bentuk, warna dan jenama". SP10 replied that the black bag had markings made by SP7. But again, the prosecution story that the accused was the sole occupant of JCQ 2852 at the material time, and that the said black bag and its contents of 5,796.7 grams of cannabis were on the back seat of JCQ 2852 at the material time, was not challenged by the defence.

As a matter of fact, all crucial aspects of the prosecution case were not challenged by the defence. SP3's testimony that he rented out PS31-3 to the accused in mid January 2001 was not challenged. The defence merely suggested, and SP3 agreed, that he (SP3) would not know "bila OKT betul-betul masuk rumah". SP6's testimony that he delivered possession of JCQ 2852 to the accused in September 1999 was not challenged. SP7's testimony in relation to the entire events at PS31-3 was not challenged.

The following is a short survey on the law relating to failure to cross-examine witnesses on a crucial aspect of the case. The leading authority is *Wong Swee Chin v. PP* [1981] 1 MLJ 212, 213, where the Federal Court per Raja Azlan Shah CJ (as HRH then was) said:

> Mr Jagjit Singh also raised as one of his main grounds of appeal that the trial judge erred in law when he held that the failure of the defence to cross-examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest (the subject-matter of the third charge) constituted a clear admission of the charge of possession by the appellant. We consider that statement of the law as a misdirection. A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* [1973] 1 NZLR 120 where Haslam J said at p. 122:
>
> > In *Phipson on Evidence* (11th Ed) para 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz*, where
> >
> > ... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy … or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

That it is not necessary to put the same question to all witnesses was said again in *Lee Ing Chin @ Lee Teck Seng v. Gan Yook Chin* [2003] 2 CLJ 19, where Gopal Sri Ram JCA held that "there was no obligation in law on the counsel's part to put the same question to PW9 as he had put to PW3 in respect of the 11 May incident". It has also been said that "… counsel … is bound to put to each of his opponent's witnesses in turn so much of his own

case as concerns that particular witness or in which that witness had any share … " (*Saul Hamid bin Pakir Mohamad v. Inspector Abdul Fatah bin Abdul Rahman & Anor* [1999] 6 MLJ 800 per Zaleha Zahari J).

Wong Swee Chin was first followed in *PP v. Abang Abdul Rahman* [1982] 1 MLJ 346, 348, where Tan Chiaw Thong J complemented as follows:

> This case, again, emphasized the need for cross-examining a witness on matters disputed by the defence which form part of the defence. In *Public Prosecutor v. Mohd Isa bin Awang & Anor* Kedah Criminal Trial No 26 of 1978 (unreported), the learned trial judge stated in his judgment on the matter of cross-examination:
>
> > It is right and proper that the witnesses should be challenged in the witness box, or at any rate that it should be made plain while the witness is in the box that his evidence is not accepted.
>
> This, however, the defence has failed to do so. (See *Re Pichi Muthu, supra*; *Chua Beow Huat v. Public Prosecutor* [1970] 2 MLJ 29 and *AEG Carapiet v. AY Derderian* AIR [1961] Cal 359). In the last-named case, it was held, *inter alia*, that:
>
> > Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. This is not merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. This much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share.
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> At page 362, in giving the reasons for this decision, Mukharji, J. said (at paras. (11) to (13):
>
> > (11) On this point the most important and decisive authority is *Browne v. Dunn* reported in [1893] 6 R 67. It is a decision of the House of Lords where Lord Herschell, L.C., Lord Halsbury, Lord Morris and Lord Bowen were all unanimous on this particular point. Lord Chancellor Herschell, at page 70 of the report observed:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

(12) Lord Halsbury, the other member of the House of Lords, at page 76 of the same report said:

> My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

(13) In fact Lord Halsbury described the situation as a 'perfect outrage' at page 77 of the said report.

And both *Browne v. Dunn* and *AEG Carapiet v. AY Derderian* (both cases were cited in *Chua Beow Huat v. PP* [1970] 2 MLJ 29) were followed in *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen* [1995] 3 CLJ 639, where Gopal Sri Ram JCA said that the rule requiring a party's case to be expressly put to his opponent's material witnesses when they are under cross-examination applies to both criminal and civil trials:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

Hence, it is settled that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony (Wong Swee Chin), or "tantamount to accepting the truth of the witness's testimony" (*PP v. Mohd Amin bin Mohd Razali & Ors* [2002] 5 CLJ 281 per Zulkefli J). It is not necessary to put the same question to all witnesses (*Lee Ing Chin @ Lee Teck Seng*). But where the opportunity to challenge the opponent's evidence is totally eschewed, then it must follow that that unchallenged evidence cannot be disputed at all (*AEG Carapiet; Browne v. Dunn*).

But in truth, in the instant case, in so far as solid proof on all crucial aspects was concerned, it would not really have mattered even if the prosecution story were challenged. It was clearly proved that the accused was the sole occupant of JCQ 2852, and that the black bag and contents of cannabis were on the rear passenger seat of the same said car that belonged to him. It was clearly proved that the accused had custody and control of JCQ 2852 at the material time, given the undisputed evidence that the accused was the sole occupant and was seated on the driver seat of a car with its engine running at the material time. It was clearly proved that cannabis was recovered from a house that was under the sole control and management of the accused. The latter was proved by the following undisputed facts; (i) that the accused was the tenant of PS31-3, (ii) that the accused had possession of the keys to PS31-3 and the 3rd bedroom, and, (iii) that PS31-3 was a bare and empty house totally bereft of all signs or articles of any human habitation or occupation, which condition and state of PS31-3 said that there could not have been other tenants, other occupiers or other users of PS31-3, and further said that the accused must have had exclusive possession of PS31-3. That the accused had exclusive possession of PS31-3 and the keys to the 3rd bedroom must lead to the inevitable deduction that the accused had possession of the drugs in the 3rd bedroom.

With respect to the drugs found in JCQ 2852, to begin with, the prosecution had proved actual possession. In *Yusmarin bin Samsudin v. PP* [1999] 4 CLJ 391, the appellant was convicted for trafficking in 2,863.1 grams of cannabis and sentenced to death. The undisputed evidence showed that the offending drug was found in four plastic packages that were placed in an unlocked black bag

and that black bag was found unconcealed on the back seat of the car driven by the appellant. The car belonged to the appellant's father but he was alone when the car was stopped and searched by the police. And the Court of Appeal per Siti Norma Yaakob JCA (as she then was) held:

> Before us, he appealed against both his conviction and sentence. In the light of such circumstantial evidence, we had found that the trial judge had misdirected himself when he ruled that trafficking had been proved. On the contrary, we consider that the prosecution evidence merely supports the lesser offence for possession, a finding that En Mohd Hanafiah bin Zakaria, learned deputy public prosecutor for the respondent was prepared to accept as the presence of the drug in the car, *per se*, cannot amount to trafficking. See the case of *PP v. Lin Lian Chen* [1991] 1 MLJ 361, [1992] 2 MLJ 561 (SC).
>
> It was under those circumstances that we had allowed the appellant's appeal against his conviction for trafficking and substituted it to that of being in possession of the dangerous drug under s. 12(2) of the Act, and sentenced him to 18 years imprisonment to take effect from the date of his arrest and 12 strokes of the rotan under s. 39A(2)(f) of the Act.

Yusmarin bin Samsudin, which on its facts is almost identical to the facts of the instant arrest at the 10km. Jalan Kluang, is clear guide from higher authority that the prosecution had at least made out that the accused had actual possession of the drugs in JCQ 2852. But it would be entirely wrong to say that the prosecution had only proved the mere presence and possession of drugs in a car under the custody and control of the accused. The prosecution had also proved the concurrent presence of drugs in a house under the control and management of the accused at about the same time that the accused was in possession of similar drugs at the 10km. Jalan Kluang. And this is a joint trial, where the evidence on record is seamless and indivisible, and where the evidence on record is to be viewed and considered in totality and as a whole, in relation to both trafficking charges and to the question of whether it was just passive possession.

With regard to the meaning of trafficking as defined in s. 2 of the Act, Lord Diplock in *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, 68, said:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in para (a) of the definition of 'traffic' and 'trafficking' in s. 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be

supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking 'transport' is sandwiched between 'sell, give, administer' which precede it and 'send, deliver or distribute' which follow it. All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person. 'Transport', although it must involve possession of the drugs by the person who transport them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. In their Lordships' view the immediate context of the verb 'transport', to which attention has been drawn, attracts the *maxim noscitur a sociis*. This, and the fact that it appears in the definition of the verb to 'traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing addictive drugs to others is the evil against which s. 3 with its draconian penalties is directed.

The Court of Appeal of British Columbia in *R v. McDonald* [1963] 43 WWR 337 at p. 342, interpreted 'transport' in the virtually identical definition of 'traffic' in the Canadian Narcotic Control Act 1960-61,as bearing this restricted meaning and the same interpretation was adopted by the Court of Appeal of Newfoundland in *R v. Greene* [1977] 74 DLR 3d 354. Acceptance of it is implicit in the *ratio decidendi* of the Court of Criminal Appeal of Singapore in *Wong Kee Chin.*

So, simply to transport from one place to another a quantity of a controlled drug intended for one's own consumption, if unauthorized by the Act or Regulations, involves an offence of having the drug in one's possession under s. 6 but does not amount to the offence of trafficking under s. 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. This is the consequence of s. 10 of the Drugs Act and s. 3(c) (which covers the same ground in part). These provisions make the question whether the transporter of the drugs achieves that purpose irrelevant to his guilt of the offence of trafficking under s. 3; since they provide that a person who does any act preparatory to, or in furtherance of, or for the purpose of the commission of the offence of trafficking in a controlled drug, shall be guilty of the substantive offence of trafficking and liable on conviction to the penalty provided for it under s. 29 and the Second Sch.

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of ss. 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible – even if there were no statutory presumption such as is contained in s. 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that s. 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under s. 15. In the instant cases, however, the quantities involved were respectively 100 times and 600 times the statutory minimum.

Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under s. 3.

That judgment of Lord Diplock was recently looked at by the Court of Appeal. In *Muhamad Safarudin bin Baba & Anor v. PP* [2002] 4 CLJ 210, Mohd Noor Ahmad JCA observed:

> From the judgment, it is manifestly clear that the factors such as the drug was for personal consumption, the type of 'transporting' or 'carrying', the quantity involved, whether or not the accused was an addict, would be relevant to rebut the presumption under s. 15(c) of the Singapore Act that the accused had the said controlled drug in his possession for the purpose of trafficking; likewise in relation to the presumption of trafficking under s. 37(da) of the Act by reason of being found in actual possession of the said drug.

And in *Mohamad Yazri bin Minhat v. PP* [2003] 2 CLJ 65, where the judgment of Lord Diplock was quoted *in extenso*, Gopal Sri Ram JCA thus pronounced:

> We have quoted at length from Lord Diplock's judgment to demonstrate the value of the direct evidence led before the learned judge and now in the record of appeal provided to us.
>
> To summarize, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

Ong Ah Chuan was not referred to in *Chow Kok Keong v. PP* [1998] 2 CLJ 469. But the Federal Court per Edgar Joseph Jr. FJ needed no precedent for to say that the offence of trafficking involves something more than passive possession and self-administration:

> To revert to the Grounds of Judgment, in considering and rejecting the defence of the Appellants, the Judge had, as we have said, relied on the definition of trafficking in s. 2 of the Act set out earlier herein.
>
> And, as we have also noted, the Judge had relied on the Supreme Court case of *Teh Geok Hock v. PP* [1989] 3 MLJ 162, where the Court briefly considered the effect of the definition of trafficking aforesaid and, in particular the Court observed:
>
> > The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffick' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession and self-administration of the drug. See *Ong Ah Chuan v. PP* [1981] 1 MLJ 64.

The judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor v. PP* [1989] 3 MLJ 289, where the court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be available even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s. 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v. PP* [1994] 2 MLJ 210, the Supreme Court followed *Cohen*.

In our view, both *Cohen* and *Ng Chai Kem*, have severely watered down *Teh Geok Hock* in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s. 39B of our Act. Having considered this point afresh, we preferred the views expressed in Cohen and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as over simplistic.

The quantities of drugs involved in the instant case were respectively more than 25 times and 15 times the minimum attracting the statutory presumption of trafficking. Given so, the inference must be preponderantly against personal consumption or passive possession. But in the instant case it was not only on account of the weight of the drugs that the inference must be against personal consumption or passive possession. A further telling piece of evidence against personal consumption or passive possession was the undisputed fact that drugs were found in an empty house. It has already been said that PS31-3 was a bare and empty house totally bereft of all signs of human habitation or occupation. The condition and state of PS31-3 said that PS31-3 could not have been used even as a residence, even as a transitory or temporary residence, at the material time. But in that house and on the floor of a locked room were 4 slabs of drugs lying on top of newsprint but underneath a large grey plastic sheet. The 4 slabs of drugs were found in a state of camouflage. Given that state of camouflage and the undisputed fact that the house was otherwise totally bare (other than the presence of a small paper box in the 2nd room), the reasonable deduction had to be that PS31-3 was used for no other purpose than to keep and or store the 4 slabs of drugs. There could be no other reasonable or plausible deduction. The fact of the matter is that there were simply no other articles or belongings in PS31-3 as could suggest that PS31-3 was used or could have been used for some other purpose than to keep and or store the said 4 slabs of drugs. Those particular circumstances undoubtedly said that the house was used to keep and or store the said 4 slabs of drugs found in PS31-3. The Dangerous Drugs Act 1952 provides that "trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug". In the case of the 4 slabs of

drugs in PS31-3, there was direct evidence of trafficking. And that direct evidence of a trafficking activity in PS31-3 said that it was totally implausible that the drugs in the car could have been for personal consumption.

Defence counsel argued that possession of the drugs in the car could have been accidental. But there was no evidence even to faintly suggest that possession was accidental or could have been accidental. In the first place, no questions were put to any of the prosecution witnesses, to put forward the case that the accused was not aware of the presence of the black bag in JCQ 2852. The evidence was that the accused would have been aware of the incriminating nature of the contents in the black bag. If not, then there could not have been 2 separate apparent attempts on the part of the accused to flee from the scene. It was unchallenged evidence that SP7 identified himself after he had removed the ignition key. Perhaps in the case of the 1st attempt it could have been, as was proposed by defence counsel, that the intention of accused was no more than to get out of the car to reclaim the ignition keys from SP7. But the 2nd attempt to flee, the fact of which there could be no doubt given that both the accised and SP10 ended up on the ground, could not be so easily answered in favour of the accused. The 2nd attempt to flee was made after SP7 had identified himself, after SP7 had frisked the accused, and after SP7 had removed the black bag from the car and had placed it on the road near the accused. The 2nd attempt to flee was made just as SP7 was about to unzip the black bag. Defence counsel proposed that it could have been that the accused might have believed that SP7 and SP10 who were not in uniform were not members of the police but were criminals who about to commit a criminal act against him – "Kemungkinan OKT tidak percaya SP7 dan SP10 adalah polis, dan mungkin ingin melakukan jenayah keatas OKT". With respect, the evidence was that the accused attempted to flee just as SP7 was about to unzip the black bag. The evidence was that SP7 was just about to search the black bag. There was no overt act on the part of either SP7 or SP10 as could reasonably have aroused any fear or apprehension in the mind of the accused that SP7 and or SP10 were about to commit a criminal act against him. With respect, the evidence was that the accused attempted to flee just as SP7 was about to unzip the black bag. That overt act on the part of SP7 was no reason for the accused to flee from the scene. The evidence proposed that the accused attempted to flee just when he realised that the game was about to be up. The evidence proposed no other plausible reason. As far as one can tell, there was no exculpatory statement of any kind from the accused at the scene, which should not be so if the accused had no knowledge of the contents in the black bag. Nope, the total conduct of the accused at the scene was consistent with guilty knowledge rather than absence thereof.

The other issues raised by defence counsel at the close of the prosecution were, (i) that the prosecution failed to summon the occupants of the neighbouring houses and former tenants of PS31-3 to testify, (ii) that the former tenants could have retained a spare set of keys to PS31-3, (iii) that the size of the cardboard boxes returning the slabs of drugs after analysis was bigger than its original size, (iv) that the marking "MM" on the black bag was not satisfactory explained, and, (v) that what was that paper box in the 2nd bedroom (see photograph P11(6)) should be proved. And none of those issues needed to be dealt with at any length. In a word, the prosecution has a duty to call all necessary witness essential to the unfolding of the narrative of the prosecution (*Ti Chuee Hiang v. PP* [1995] 3 CLJ 1), and that was done in the instant case without the testimony of the neighbours and or former tenants. As for the size of the cardboard boxes returning the slabs of drugs after analysis, it was clearly explained by the chemist that she could not repack the slabs of drugs after analysis into the original boxes, as those slabs of drugs after analysis had taken on greater bulk, and that she enlarged the original boxes to repack those slabs of drugs after analysis into what were the original boxes but enlarged to accommodate the greater bulk of the slabs of drugs after analysis. As for the marking "MM" on the black bag, SP7 said he made the mark "M" but not "MM". SP7 could not explain how it came to be "MM". But there was no doubt that SP7 and SP10 had indelibly identified the black bag; both SP7 and SP10 identified the black bag on the basis of the signature of SP7 on the black bag and on the basis of the distinctive embossment "Nike AEG" on the black bag. As for that small paper box seen in the photograph of the 2nd bedroom, its presence could not cast any doubt on the ironclad case of exclusive possession of PS31-3 and 3rd bedroom by the accused. And as for the possibility of the former tenants retaining a set of spare keys, there was no evidence to show the context to be otherwise than that only the accused had exclusive possession of PS31-3 and the 3rd bedroom.

Rather, the evidence adduced by the prosecution proved that the accused was keeping and or storing drugs in house PS31-3. And proof of that activity made it wholly implausible that the possession of drugs of such a substantial quantity by the accused in JCQ 2852 could have been mere passive possession. The aforesaid maximum evaluation of the prosecution evidence showed that the prosecution had proved the facts and circumstances for to say that the accused was trafficking. Even without legal presumptions, there was clear, strong, and most credible evidence to each ingredient of each charge. The evidence adduced was more than sufficient to warrant an answer. On both counts, there was a prima facie case to answer. Consequently, the accused was called to enter his defence, except that the time of the alleged offence in the 2nd charge was amended to 1am.

The accused testified on oath as follows. On 14 January 2001, he telephoned his elder sister, one Zaini bin Arshad. He informed his sister that his friend, one Ismail who was also called Mail, was looking for a house to rent. His sister informed him that the house next door to hers was vacant. He asked his sister to contact the house owner. "Selepas itu kakak saya telah menalipon saya". Two days later, his sister informed him that the house owner "memang hendak menyewakan rumah tersebut dengan bayaran deposit sebanyak RM630 dan tuan rumah hendak berjumpa dengan saya pada hari keesokan". The next day, he went to his sister's house. "Saya berbual dengan kakak. Tidak lama selepas itu, datang seorang cina bersebelahan rumah kakak saya. Kakak saya mengatakan bahawa itulah tuan punya rumah. Lepas itu saya keluar dari rumah kakak saya dan berjumpa dengan lelaki cina itu. Selepas itu lelaki cina itu mengajak saya melihat keadaan rumah. Lelaki cina itu pernah memberi keterangan dalam kes ini. Dia adalah SP3. Selepas melihat keadaan rumah, saya dan SP3 telah keluar dari rumah tersebut. SP3 telah menguncikan rumah tersebut. Selepas itu, saya bagi pihak Mail telah menyerahkan wang deposit sebanyak RM630 yang diserahkan olih Mail kepada saya pada malam tadi. Selepas itu, tuan rumah telah menyerahkan kunci rumah pada saya. Setelah sampai di rumah kakak saya, saya telah menalipon Mail untuk datang ke rumah kakak saya dan mengambil kunci rumah yang dia hendak sewa, selepas dia habis kerja. Mail came at 1pm on the same day. "Pada ketika Mail datang saya dan kakak ada dalam rumah kakak." He invited Mail to come into the house for a drink. "Dan saya menyerah kunci kepada Mail di hadapan kakak saya. Kakak saya melihat saya serahkan kunci kepada Mail. Saya tak ingat alamat rumah tersebut." But the accused said that the house on the right and seen in photograph P11(4) was his sister's house. "Selepas terima kunci, Mail pun keluar dari rumah kakak saya dan pergi ke rumah sebelah. Selepas itu, saya lihat Mail terus pulang." He then returned to his house at 10, Jalan Anggerik, near Kampong Istana, Batu Pahat. Then at 7pm on 26 January 2001, whilst he was at work at the Sharp-Roxy factory, Mail contacted him. Mail said that their mutual friend, one Mansor, would be arriving at the Batu Pahat Bus Station at 12 mid-night from Johor Baru. "Mail mengatakan bahawa dia tidak dapat menjemput Mansor kerana dia bekerja pada malam itu. Kemudian Mail mengatakan pula bahawa beliau akan berjumpa dengan saya ditempat punch card keluar masuk kerja, pada pukul 10 malam. Mail juga mengatakan pada saya bahawa Mansor akan tinggal di rumah sewanya bersama-sama dengan Mail. Mail juga kerja di Kilang Sharp-Roxy. Pada 26 Januari 2001 saya masuk kerja pada 10 pagi dan habis kerja pada 10 malam. Pada 26 Januari 2001, Mail bekerja pada 10 malam dan habis kerja pada 10 pagi hari keesokkan. Pada 10 malam 26 Januari 2001, saya berjumpa Mail ditempat punch card keluar masuk kerja. Dia meminta maaf pada saya kerana menyusahkan saya. Kemudian beliau menyatakan bahawa beliau terpaksa bekerja

pada malam itu. Beliau juga menyerahkan kunci rumah sewa beliau, kepada saya. Selepas itu saya pulang kerumah saya beralamat No. 10. Pada 11.45 malam, saya telah keluar dari rumah dengan memandu kereta JCG 2852 dan saya pergi ke Bas Stand Batu Pahat, untuk menjemput Mansor yang datang dari Johor Bahru. Selepas sampai di Bas Stand Batu Pahat saya melihat Mansor, dan saya pergi berjumpa dengannya. Saya melihat Mansor memegang sebuah beg. Selepas itu saya menerangkan pada Mansor bahawa Mail tidak dapat datang, dan saya juga ada menyerahkan kunci rumah Mail kepadanya, tetapi beliau menyuruh saya menyimpannya. Selepas itu saya mengajak Mansor pergi ke kereta JCQ 2852. Saya melihat Mansor meletak begnya diseat belakang kereta, dan beliau duduk disebelah saya. Ketika dalam perjalanan Mansor ada memberitahu saya bahawa dia ingin berjumpa dengan Mail. Saya kata pada dia Mail kena kerja. Dia mengarah saya untuk berjumpa dengan Mail. Saya kata kalau nak jumpa dengan Mail kena pergi kilang Mail bekerja. Selepas itu saya terus memandu kereta ke kilang Sharp-Roxy dimana Mail sedang bekerja. Setelah sampai dikilang tersebut saya berhentikan kereta berhampiran pondok telefon. Selepas itu saya menyuruh Mansor masuk ke dalam kilang dan berjumpa dengan Mail. Saya tidak mengikut Mansor kerana saya penat, sebab saya baru balik kerja. Saya tidak mematikan injin kerana saya ingin mendengar muzik. Saya nampak Mansor pergi ke pondok jaga dan masuk ke dalam kilang. Saya dapat melihat Mansor melalui cermin kereta. Saya sampai di kilang tersebut pada lebih kurang 12.30-12.45. Selepas itu saya dapati ada sebuah kereta parking dibelakang kereta saya. Kemudian tidak lama selepas itu, seorang lelaki India telah masuk ke dalam kereta saya disebelah pemandu. Saya duduk ditempat pemandu. Pada ketika itu juga, seorang lagi lelaki India telah mematikan enjin dan mengambil kunci kereta saya melalui tingkap. Saya merasa terkejut dan cuba keluar kereta untuk mengambil balik kunci kereta. Kemudian saya berjaya keluar kerana tangan saya dipegang oleh lelaki India yang telah masuk ke dalam kereta saya. Dua lelaki ada memberi keterangan dalam kes ini. Inspektor Ramesh yang matikan enjin saya. Selepas itu, SP7 menyuruh saya keluar. Saya keluar. Kemudian, SP10 keluar dari kereta saya juga. SP10 bersama saya, disebelah saya. Kemudian saya nampak SP7 mengeluarkan beg Mansor. SP7 cuba membuka beg tersebut. Saya menolak SP10 kerana saya fikir bahawa mereka ini perompak kerana mereka berpakaian biasa. Dan lagi kelakuan mereka seperti hendak menyamun saya. Semasa saya menolak SP10, SP10 telah pegang leher saya, dan saya terjatoh. Kemudian saya dibangunkan dan dipegang oleh SP10. Dan SP10 terus mengari saya ketika itu baru saya fikir mereka ini polis kerana pada pengetahuan saya hanya polis mempunyai gari. Lepas itu saya digari, saya lihat SP7 membuka beg Mansor dan mengeluarkan bungkusan plastik ludsinar. Kemudian saya diperiksa oleh SP7. Kemudian SP7 telah mengambil dompet saya. Selepas itu saya lihat ada beberapa orang lagi berpakaian biasa datang ke tempat kilang. Kemudian SP7

mengambil kunci rumah sewa Mail. Kunci rumah diambil bersama dompet. Selepas itu beberapa orang telah datang. Mereka telah membuat pemeriksaan dalam kereta saya. Selepas itu mereka telah membawa saya kerumah sewa Mail. Kemudian saya lihat SP7 membuka pintu grillee dan pintu kayu dengan menggunakan kunci Mail. Selepas itu SP7 masuk bersama orang-orang lain dan bersama saya masuk. SP7 buka lampu. Saya lihat SP7 membuka pintu bilik ketiga dengan menggunakan kunci. Selepas itu beliau masuk ke dalam bilik. Saya pun masuk ke dalam bilik. Di dalam bilik tersebut saya lihat ada plastik kelabu dan saya lihat SP7 mengangkat plastik tersebut dan saya nampak ada beberapa bungkusan ludsinar. Kemudian, selepas itu SP7 membawa semua barang tersebut. Selepas itu saya dan lain keluar dari rumah. Saya lihat ada orang yang mengunci balik rumah tersebut. Thereafter, he was taken to the Sri Gading Police Station, and then to the Batu Pahat Police Station. SP11 took away his jeans and shirt, and gave him a short trouser. The next day, he was brought before a Magistrate. Back at the Batu Pahat Police Station, he met SP11 at SP11's ASP office where he was again beaten. Prior thereto, he was beaten at the Gri Gading Police Station, and at SP11's office. "Dalam lokap saya juga ada dipukul oleh ASP Wahid." Pada 27 Januari 2001 dan selepas, ada soal-siasat dijalankan. Dalam soal-siasat saya ada menceritakan tentang Mail. Saya memberitahu jalan kerumah Mail. Saya ada memberitahu tempat kerja Mail. Saya juga ada beritahu tentang Mansor. Saya ada memberitahu wajah Mansor. Saya memberi statement secara lisan dan secara bertulis. Kedua-dua pun ada."

On the next sitting, Dato' Shukri bin Haji Mohamad appeared as lead counsel for the accused who continued his testimony as follows. "Saya berada ditepi kilang Sharp-Roxy di dalam kereta selama 5-10 minit sebelum polis datang. Dalam 5-10 minit itu saya tidak pernah memegang beg hitam. Pada kali pertama saya melihat beg hitam adalah semasa berada di Bas Stand Batu Pahat, ketika kawan saya Mansor memegang beg itu. Saya tidak tahu ada benda di dalam beg hitam. Saya baru tahu isi kandungan dalam beg semasa saya digari. Apabila saya dapat tahu isi kandungan dalam beg saya rasa terkejut. Semasa saya digari, Mansor berada ditempat pondok jaga. Mansor berada di pondok jaga, sebab dia ingin jumpa Mail. Mail berada di dalam kilang. Semasa saya digari, tidak ada perbualan antara saya dengan polis. Semasa saya diperiksa ditepi saya ada sebut tentang Mansor. Saya kenal Mansor melalui Mail. Saya kenal Mansor sudah tiga bulan sebelum kejadian. Setahu saya Mansor tinggal di Johor Bahru. Mansor ada tinggi sebaya saya, kulit putih dan berambut lurus, umur lebih kurang 35 tahun. Mail rendah sedikit pada saya, badan gempal, kulit chocolate, rambut tidak kerinting, umur lebih kurang 33 tahun. Tinggal di Parit Simen, dekat Bagan Batu Pahat. Saya kenal Mail lebih kurang 2 tahun sebelum kejadian. Kakak saya juga kenal Mail. Pada 7 malam semasa saya bekerja, Mail ada menalifon saya. Mail mengatakan bahawa dia tidak dapat jumpa

Mansor di Bus Stand. Semasa saya keluar dari rumah saya ambil kunci rumah untuk diserah kepada Mansor. Sebelum 7 malam, kunci rumah berada dengan Mail. Sebelum 7.00 malam, kunci rumah berada dengan Mail selama 10 hari. Sebelum itu saya tidak mempunyai akses ke rumah PS31-3. Antara 7 malam – 10 malam, kunci rumah berada dengan Mail. Saya tidak pernah masuk ke dalam rumah P531-3, pada bila-bila masa. Sebenarnya, Mail yang menyewa rumah. Kakak saya tahu Mail yang sewa rumah itu. Polis ada ambil cop jari saya. Kali pertama saya melihat ganja dalam rumah adalah semasa saya dibawa oleh polis ke rumah tersebut. Sebelum itu saya tidak tahu ada ganja dalam rumah. Saya tidak tahu siapa yang ada masuk rumah tersebut. Saya tidak tahu samada Mail ada masuk ke dalam rumah. Melalui rear view mirror saya dapat lihat Mansor masuk ke pondok jaga.

In broad terms, it was the testimony of the accused that it was Mansor who left the bag and contents inside JCQ 2852, that it was Ismail also called Mail who rented PS31-3, and that he was not connected in any way to any of the drugs produced in court. And that testimony of the accused in all its aspects and facets was emphatically challenged by the prosecution who elicited the following testimony from the accused. The accused did not know the full name of Ismail or Mansor. Sharp-Roxy had strict rules concerning visitors who would have to wait outside the factory premises. The accused was handcuffed after the 6 slabs of drugs were taken out from the black bag. The accused was brought before the Magistrate on 27 January 2001, 6 February 2001, 6 April 2001, 3 May 2001, 6 June 2001, 9 July 2001, and 13 August 2001. The accused did not lodge any police report concerning any alleged assault by the police (the prosecution challenged the accusation that the accused was assaulted). Under re-examination, the accused said that when he was first brought to court he complained to the Magistrate that the police assaulted him.

The only other witness for the defence was one Zaini bte Arshad (DW2) who testified that the accused was her brother and that the accused in January 2001 resided at 10 Jalan Anggerik, Kampong Istana, Batu Pahat. The rest of her testimony may be paraphrased as follows. On 14 January 2001, the accused contacted her and asked her to look out for a house to rent for his friend, one Mail. "Saya kenal Mail. Saya kenal dia semasa saya kerja di Sharp. Saya pernah kerja di kilang Sharp-Roxy daripada 1996-2002 … sebagai pengawal keselamatan." The house next door was vacant. She agreed to enquire from the house owner. She asked the house owner if his house was available for rental. "Tuan rumah jawab rumah itu memang di sewakan." Two days later, she contacted the accused. "Saya mengatakan rumah itu memang di sewakan." The house owner informed her that a deposit of RM630 was payable. "Selepas itu, tuan rumah suruh OKT datang melihat rumah itu." The next day, the

accused came to her house. She was talking to the accused when she saw the house owner walking towards the house next door. She pointed out the house owner to the accused. The accused walked out of her house to speak to the house owner. A short while later, she saw the accused and the house owner leaving the house next door. "OKT menyerahkan wang dan tuan rumah menyerahkan kunci." The accused telephoned Mail from her house. The accused asked Mail to come to her house to collect the house keys. At about 1pm, Mail came to her house. The accused invited Mail to enter her house and to take a drink. The accused handed the house keys to Mail. "Selepas itu Mail pun balik." "Rumah itu tidak bernombor, rumah itu ada di sebelah rumah saya. Saya pasti tuan rumah berjumpa dengan OKT. Saya tak tahu wang RM630 datang dari mana. Rumah itu untuk kawan OKT." In January 2001, the accused was living with their mother at 10, Jalan Anggerik. "OKT tidak pernah berhasrat bertinggal bersendirian."

Under cross-examination, DW2 testified as follows. "Saya sayang OKT, saya tidak mahu OKT masuk penjara." In January 2001, she was living next to the house "yang di sewakan". She lived in that house from 2000 to 2001. She rented that house. She did not know the name of her landlord. Her landlord was also the owner of the house next door. She did not now know the full name of Mail. She had met Mail. "Orang itu rendang kulitnya chocolate, rambutnya kerinting, umurnya dalam 30's, tingginya l/k dengan saya. Size badan gempal." The prosecution also challenged the testimony of DW2 in all its aspects and facets. Under re-examination, DW2 maintained that her testimony was true, and said that her love for the accused "tidak sampai peringkat berbohong".

As soon as the defence had closed its case, Puan Haslinda binte Abu Bakar, the learned DPP, applied for leave to adduce rebuttal evidence. She contended that Mail was raised only at the stage of the defence, and that the prosecution should be given a chance to rebut Mail. Dato' Shukri merely contended that there is no right to adduce rebuttal evidence, and that to allow the calling of rebuttal evidence would offend the provisions of s. 182A of the Criminal Procedure Code.

But how could it be so submitted, unless with tongue in cheek, that there is no right to call rebuttal evidence. There is clear law for such evidence. Section 425 of the Criminal Procedure Code provides:

> Any court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

Section 425 had been examined by the former Supreme Court. In *PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142, Abdul Hamid Ag LP (as he then was), explained:

> Section 425 of the Criminal Procedure Code is clearly divided into two limbs; first, a discretionary provision which provides that the court may, on an application, summon any person as a witness or recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding under the Code. In exercising the discretion under the first limb, the court clearly must proceed with utmost circumspection especially when there was likelihood of the fresh evidence proving to be prejudicial to the accused. Secondly, an imperative provision which requires the court to do so where the court is satisfied that the evidence to be summoned would appear to the court to be essential to a just decision of the case (see *Mohd Azam v. Mohd Iqbal* PLD 1984 SC 95 with the corresponding section in the Pakistan Criminal Procedure Code).
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> In this regard the court is bound to admit fresh evidence when it appears essential to a just decision of a case. As the powers under this section are very wide it is therefore necessary that great care be taken when exercising such discretion. However the second limb of this section being an imperative provision the court must give serious consideration to exercising such powers if in so doing a just and proper decision could be arrived at.

In *Ramli bin Kechik v. PP* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243, Mohamed Azmi SCJ, delivering the judgment of the Supreme Court, held, in relation to s. 425:

> The section is intended to enable the court to get at the truth and to come to a proper conclusion in the matter under inquiry or trial. It is not limited to witnesses whom the court examines on its own behalf but also applies to witnesses for the prosecution as well as witnesses for the defence. Hence, the defence as well as the prosecution may be allowed to adduce additional evidence under this section. The object of the section is just as much the prevention of escape of a guilty person through some carelessness of the prosecution or the Magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of one party. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the court would be justified in exercising its discretion in calling for additional evidence under this section. Where the court is of the opinion that the evidence of certain witnesses is essential to the just decision of the case, it is bound to summon them, and for this purpose the trial can be adjourned. A just decision under this section does not mean a decision in favour of the defence (see *Rengaswami Naicker*'s case [1954] Cr LJ 123). Thus, it would not be an improper exercise of the power merely because the evidence taken supports the case of the prosecution and not that of the accused. In our view, by its nature the discretion to be exercised under

a section 425 CPC depends on the facts of each case – the main consideration being the essentiality of the additional evidence to the just decision of the case.

Hence, s. 425 is in 2 parts. "... the first part gives purely discretionary authority to the criminal court ... On the other hand, the second part is mandatory ... " b (*Hamid's Criminal Procedure*, 2nd edn pp. 1052-1053). "Section 425 of the Code is clearly divided into two limbs: first a discretionary provision which provides that the court may on application, summon any person as a witness or recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding under the Code. In exercising the discretion c under the first limb, the court clearly must proceed with utmost circumspection especially when there was likelihood of the fresh evidence proving to be prejudicial to the accused. Secondly, an imperative provision which requires the court to do so where the court is satisfied that the evidence to be summoned would appear to the court to be essential to a just decision of the case (*PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 on appeal from *PP v. Phon Nam* [1987] 2 MLJ 262)" (*Hamid's Criminal Procedure ibid* 1953). That caution on utmost circumspection only concerns the first limb; "but not on the imperative provision where the court considers the fresh evidence to be essential to a just decision' (*PP v. Abdul Rahim bin Abdul Satar* [1990] 1 CLJ 840; e [1990] 3 CLJ (Rep) 1 per Wan Yahaya J, as he then was). For far from being discretionary, "the power under (the 2nd limb of) s. 425 is to be exercised where the court is of the opinion that the evidence of certain witnesses is essential to a just decision of the case" (*Hamid's Criminal Procedure ibid* p. 1056). "The mandatory part of the section compels the court ... if the new evidence appears to be essential to a just decision of the case" (*Mallal's* f *Criminal Procedure* 5th edn para 15527).

The main consideration is "the essentiality of the additional evidence for the purpose of arriving at a just decision of the case" (*Phon Nam v. PP* [1991] 2 CLJ 1467; [1991] 1 CLJ (Rep) 381 per Hashim Yeop Sani CJ). Hashim Yeop g Sani CJ went on to say:

> The real object of the exercise of discretion under s. 425 of the Code is to enable the court to arrive at a just decision so that the failure to call for the additional evidence would not result in an erroneous acquittal or in an erroneous conviction. The exercise of the discretion is not an arbitrary decision h to favour the prosecution or the defence. The discretion is never intended to make 'emergency repairs' to the prosecution case as correctly stated by Mohtar Abdullah J in *PP v. Lin Lian Chen*. At the core of s. 425 is the interest of justice and the exercise must always be in the interest of justice.

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The following authorities even say that the powers conferred upon the court under this section are wider than the corresponding powers in English law. In *Jacob v. PP* [1948-1949] Supp MLJ 20, Callow J said:

> After consideration of the authorities I have cited, others I have studied, and from the general circumstances of the case, I distinguish the law in this country from that in England by holding that whereas in England the Court should not call a witness after the close of the defence unless something has arisen ex improviso, which no human ingenuity could foresee, on the part of the accused; in Malaya the power so vested in the Court by virtue of section 425 of the Criminal Procedure Code may be exercised after the close of the defence if the further evidence appears essential to the just determination of the case.

In *Re Adam Aman; Hoesin bin Ghani v. PP* [1958] 24 MLJ 229, Rigby J held as follows:

> I would respectfully agree with the view in Jacob v PP to which I have already referred, than the powers conferred upon the court under this section are wider – much wider, I think – than the corresponding powers in English law. The Court is expressly vested with the statutory power at any time before judgment to call or recall a witness if his evidence appears to it essential to the just decision of the case. The sole test as to whether he has properly exercised his discretion lies in the answer to those last words, namely, was such evidence essential to the just decision of the case or, put in another way, did the calling of such evidence occasion a miscarriage of justice. It seems to be that the answer to that question must logically be that every case must be considered on its own merits and in relation to its own facts. I would venture to express the opinion that it is not sufficient for the appellate Court to say that the Magistrate has wrongly exercised his discretion merely because the appellate Court itself would not similarly have exercised the same discretion in the same way.

That s. 425 gives a wide power to the court was also observed by KC Vohrah J (as he then was) in *PP v. Samsul Kamar bin Mohd. Zain* [1988] 1 CLJ 542; [1988] 2 CLJ (Rep) 310:

> Section 425 further allows any court 'at any stage of any inquiry, trial or proceeding' under the Criminal Procedure Code, to summon and examine any person as a witness if his evidence appears to it essential to the just decision of the case. There is a power to or recall witnesses even after the close of the case for the defence but in such a case there should be hesitation to do so without strong grounds (see *R v. Bakar bin Sahat* [1951] MLJ 202). To my mind, the utmost caution and the same hesitation should apply before witnesses are recalled or called at the stage of defence proceedings bearing in mind that the pivotal principle should be that the evidence required appears to be essential to the just decision of the case. Having regard to the fact that

> the prosecution has been surprised by the application of the defence and that the prosecution's examination of its witnesses will be limited to that narrow issue mentioned earlier, ie, the rebuttal of facts alleged by the accused in his testimony and allegedly corroborated by a previous statement, to my mind, witnesses may be called by the prosecution after it has closed its case for the limited purpose of that narrow issue.

And Syed Othman J (as he then was), in *PP v. Abdul Hamid* [1969] 1 MLJ 53, expressed similar views that s. 425 gives wide powers to the court to summon and examine any person to give evidence, and reiterated that the power must be exercised with the utmost caution and only when the evidence of that person appears to the court essential to the just decision of the case. His Lordship likewise stressed that "in a criminal trial at the close of a case of any party the court should not call any witness unless there is strong and valid reason".

And as to what new evidence is essential to a just decision of the case, in *PP v. Kenneth Fook Mun Lee* [2002] 2 MLJ 563, Augustine Paul J, (as he then was) demonstrated it most effectively in the following paragraphs of his judgment:

> I now deem it pertinent to consider, what is perhaps obvious, the kind of evidence which the rule excludes. In *R v. Rice* [1963] 1 QB 857, Winn J said at p. 860:
>
> > There is a general principle of practice, although no rule of law, requiring that all evidential matter that the Crown intends to rely upon as probative of the guilt of the defendant ... should be adduced before the close of the prosecution's case if it be then available.
>
> As Winn LJ said in *R v. Milliken* [1969] 53 Cr App R 330 at p. 333:
>
> > Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the defendant and where it is reasonably foreseeable by the prosecution that some gap in the proof of guilt needs to be filled by evidence called by the prosecution, then, generally speaking, the court is likely to rule against the closing of any such gap by rebuttal evidence ...
>
> Thus, the rule only excludes evidence that is relevant to an element of the offence to be proved by the prosecution. Rebuttal evidence by the prosecution is therefore restricted to evidence to meet new facts introduced by the defence (see *R v. Campbell* [1977] 38 CCC (2d) 2). It may not merely confirm or restate the case for the prosecution by calling the same or fresh witnesses (see *R v. Sullivan* [1922] 16 Cr App R 121; *John v. R* [1985] 23 CCC (3d) 326; *R v. Krause* [1987] 29 CCC (3d) 385). As Taunton J said in *R v. Hilditch* [1832] 5 Car & P 986:

> Proving that the parties were near the place at which the offence was committed is evidence in chief and not evidence in reply. Whatever is a confirmation of the original case cannot be given as evidence in reply; and the only evidence which can be given as evidence in reply, is that which goes to cut down the case on the part of the defence, without being any confirmation of the case on the part of the prosecution.

In the instant case, the prosecution applied to adduce rebuttal evidence to meet Mail, a fact unquestionably introduced by the defence only at the stage of the defence, and a fact not put at all or even vaguely intimated by the defence at the stage of the prosecution case. In fact, the entire defence story in relation to Mail, to Mansor, and even to DW2, was not put at all by the defence at the stage of the prosecution case. Mail was certainly raised ex improviso. It could be said with absolute certainty that Mail was a matter that the prosecution would not even with all human ingenuity have foreseen. Fairly said, the prosecution would not have not been taken by surprise. It would only be fair that the prosecution be given a chance to answer the evidence given ex improviso. Leave was therefore granted to the prosecution to adduce evidence to rebut Mail.

The prosecution summoned 2 witnesses (SP12 and SP13) to rebut Mail. SP12 (Hamidah binte Talib – a Penolong Pegawai of Sharp Manufacturing Corporation Malaysia Sdn. Bhd.) testified that since 1991 she was in charge (menyelenggara) of the attendance records of the employees of Sharp Manufacturing Corporation Malaysia Sdn. Bhd. at PLO 225, Kawasan Perindustrian Sri Gading, Batu Pahat, Johore. On 26 January 2001, there were two shifts; one from 10am to 10pm and the other from 10pm to 10am of the following day. On 26 January 2001, one Zulkifli Arshad was at work from 10am to 10pm. On 26 January 2001, there was no one by the name of Ismail who was at work on either of those two shifts. Under cross-examination, SP12 testified that Sharp Manufacturing Corporation Malaysia Sdn. Bhd. and Sharp-Roxy Electronics Malaysia Sdn. Bhd. are different entities. On 26 January 2001, there were about 80 shift workers. In all, Sharp Manufacturing Corporation Malaysia Sdn. Bhd. had about 1,800 employees. Two employees had the name of Ismail. Under re-examination, SP12 said that none of those two employees with the name of Ismail was at work on either of those two shifts on 26 January 2001.

SP13 (Tahir bin Atan – an assistant manager of the Sharp-Roxy Electronics Corporation Malaysia Sdn. Bhd.) testified that on 26 January 2001, there were two shifts; one from 10am to 10pm and the other from 10pm to 10am of the following day. On 26 January 2001, there was no one by the name of Ismail who was at work on either of those two shifts. Under cross-examination, SP12

testified that Sharp-Roxy Electronics Malaysia Sdn. Bhd. had about 2,000 employees. SP13 could not say if there was an employee with the name of Ismail amongst those 2,000 employees. SP13 further said that Sharp Manufacturing Corporation Malaysia Sdn. Bhd. and Sharp-Roxy Electronics Malaysia Sdn. Bhd. shared the same main entrance and guardhouse, that the employees of both Sharp Manufacturing Corporation Malaysia Sdn. Bhd. and Sharp-Roxy Electronics Malaysia Sdn. Bhd. would enter and leave both factory premises by the one and same main entrance and guardhouse (SP12 and SP13 testified that the factory premises seen in photographs P11 (1-3) housed both Sharp Manufacturing Corporation Malaysia Sdn. Bhd. and Sharp-Roxy Electronics Malaysia Sdn. Bhd., which were companies controlled by Sharp Corporation of Japan), and that all visitors would have to present themselves at the guardhouse. Under re-examination, SP13 reinterated that there was no one by the name of Ismail who was at work on either of those two shifts on 26 January 2001. SP13 further related that all visitors during the night "memang tidak di benarkan masuk ke dalam kawasan kedua-dua kilang".

Hence, it was said by SP12 and SP13 that there was no one by the name of Ismail was working at Sharp Manufacturing Corporation Malaysia Sdn. Bhd. or at Sharp-Roxy Electronics Malaysia Sdn. Bhd. on either shifts on 26 January 2001. It is pertinent to recall the testimony of the accused on Mail in relation to Sharp-Roxy Electronics Malaysia Sdn. and or Sharp Manufacturing Corporation Malaysia Sdn. Bhd. The accused testified that at 7pm on 26 January 2001, whilst he was at work at Sharp-Roxy, Mail contacted him and said that their mutual friend, one Mansor, would be arriving at the Batu Pahat Bus Station at 12 mid-night from Johor Baru. "Mail mengatakan bahawa dia tidak dapat menjemput Mansor kerana dia bekerja pada malam itu. Kemudian Mail mengatakan pula bahawa beliau akan berjumpa dengan saya ditempat punch card keluar masuk kerja, pada pukul 10 malam. Mail juga mengatakan pada saya bahawa Mansor akan tinggal di rumah sewa nya bersama-sama dengan Mail. Mail juga kerja di Kilang Sharp-Roxy. Pada 26 January 2001 saya masuk kerja pada 10 pagi dan habis kerja pada 10 malam. Pada 26 January 2001, Mail bekerja pada 10 malam dan habis kerja pada 10 pagi hari keesokkan. Pada 10 malam 26 January 2001, saya berjumpa Mail ditempat punch card keluar masuk kerja. Dia meminta maaf pada saya kerana menyusahkan saya. Kemudian beliau menyatakan bahawa beliau terpaksa bekerja pada malam itu. Beliau juga menyerahkan kunci rumah sewa beliau, kepada saya. Selepas itu saya pulang kerumah saya beralamat No. 10."

There was no ambiguity in the testimony of the accused with regard to Mail and Sharp-Roxy Electronics Malaysia Sdn. Bhd. The accused testified that Ismail was an employee of Sharp-Roxy Electronics Malaysia Sdn. Bhd., and that Ismail was working on the shift from 10pm on 26 January 2001 to 10am

on 27 January 2001. The accused testified that on 26 January 2001 he ended his shift at 10pm while Ismail commenced his shift at 10pm, and that at 10pm on 26 January 2001 he met up with Ismail at the punch card station – "Pada 10 malam 26 January 2001, saya berjumpa Mail ditempat punch card keluar masuk kerja". And the accused testified that Ismail reported for work at 10pm on 26 January 2001. According to the accused, Ismail even spoke and then handed P8C to him – "Dia meminta maaf pada saya kerana menyusahkan saya. Kemudian beliau menyatakan bahawa beliau terpaksa bekerja pada malam itu. Beliau juga menyerahkan kunci rumah sewa beliau, kepada saya". There could be no mistaking it. It was the unmistakable testimony of the accused that Ismail reported for work at 10pm on 26 January 2001.

But on the other hand, it was the clear testimony of SP12 and SP13 that no one by the name of Ismail reported for shift work at 10pm on 26 January 2001 at Sharp-Roxy Electronics Malaysia Sdn. Bhd. or Sharp Manufacturing Corporation Malaysia Sdn. Bhd., or was working from 10pm on 26 January 2001 to 10am on 27 January 2001 in their respective factories. It should go without saying that the entire defence in relation to Mail and Sharp-Roxy would come unstruck if SP12 and SP13 were to be believed. But could SP12 or SP13 not be believed? Both were undoubtedly impartial and independent witnesses. Both had no direct interest in the outcome. Both had no incentive to lie. Both were truthful witnesses who testified on the basis of records maintained by Sharp-Roxy Electronics Malaysia Sdn. Bhd. and Sharp Manufacturing Corporation Malaysia Sdn. Bhd. Both were credible witnesses who were firm in their testimony. And both were not shaken by all examination. Put simply, there was just no reason to disbelieve SP12 and or SP13, and or to detract the weight that should be accorded to their authoritative testimony.

But with regard to the accused's testimony on Ismail, on Mansor, and or on Zaini, there was ample reason to detract the weight to be accorded. In the first place, the defence had not put its case to the prosecution witnesses. The whole point and purpose of the defence having to put its case to the prosecution witnesses, was made patently clear in two judgments of the apex court. In *PP v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285, the then Supreme Court per Edgar Joseph Jr. SCJ enunciated:

> A final point needs to be made. The trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention.

And in *Alcontara a/l Ambrose Anthony v. PP* [1996] 1 CLJ 705, Edgar Joseph Jr FCJ further explicated:

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention – in other words, 'kept up its sleeve', as it were – and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond all reasonable doubt.

To the learned observation of Edgar Joseph Jr. FCJ, the Court of Appeal in *Mohan Singh a/l Lachman Singh v. PP* [2002] 3 CLJ 293 added:

> To that learned observation we would merely add this. The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself: *Abdullah Zawawi v. PP* [1985] 2 MLJ 16. That has always been the law. It is still the law.

The task of the instant accused was to raise a reasonable doubt. And how had the accused gone about it. Sad to say, the accused had gone about it by springing his entire defence on the prosecution. The accused raised for the first time the alleged role of Mail or Mansor and or Zaini only when he took the witness stand. On top of that, in the following aspects, the accused gave an account that was inconsistent with the unchallenged facts presented by the prosecution. With regard to PS31-3, the accused testified that he rented it on behalf of Mail. But that claim went against the grain of the unchallenged testimony of SP3 that the accused said to SP3 that he (accused) said he (accused) wanted to rent PS31-3 – "Saya bersihkan sebab OKT memberitahu dia ingin sewa" (see p. 17 of the Notes of Proceedings). With regard to the keys, the accused testified "Saya berbual dengan kakak. Tidak lama selepas itu, datang seorang cina bersebelahan rumah kakak saya. Kakak saya mengatakan bahawa itulah tuan punya rumah. Lepas itu saya keluar dari rumah kakak saya dan berjumpa dengan lelaki cina itu. Selepas itu lelaki cina itu mengajak saya melihat keadaan rumah. Lelaki cina itu pernah memberi keterangan dalam kes ini. Dia adalah SP3. Selepas melihat keadaan rumah, saya dan SP3 telah keluar dari rumah tersebut. SP3 telah menguncikan rumah

tersebut. Selepas itu, saya bagi pihak Mail telah menyerahkan wang deposit sebanyak RM630 yang diserahkan oleh Mail kepada saya pada malam tadi. Selepas itu, tuan rumah telah menyerahkan kunci rumah pada saya. Setelah sampai di rumah kakak saya, saya telah menalipon Mail untuk datang ke rumah kakak saya dan mengambil kunci rumah yang dia hendak sewa, selepas dia habis kerja" (see p. 121 of the Notes of Proceedings). According to the account of the accused, the keys were immediately handed over just after he and SP3 had jointly viewed PS31-3. But that went against the grain of the unchallenged of SP3 that he (SP3) handed over the house after he had washed the entire house – "Sebelum sewakan kepada OKT saya ada masuk rumah untuk bersihkan rumah tersebut" (see p. 16 of the Notes of Proceedings). The unchallenged testimony of SP3 was that he did not enter the house after it was rented to the accused – "Selepas bersihkan, dan berkunci balik, saya tidak pernah masuk ke dalam rumah itu" (see p. 16 of the Notes of Proceedings). The effect of the unchallenged testimony of SP3 was that he washed the entire house before he handed the keys to the accused. The effect of the unchallenged testimony of SP3 was that there was an interval of time (the time that SP3 would have taken to wash the house) between him meeting the accused and then handing the keys to the accused. Contrary to the assertion of the accused, the total effect of the unchallenged testimony of SP3 was that the house keys were not handed over there and then.

The accused also gave an account that was contradictory in the following material aspects. With respect to Mansor, the accused testified "Ketika dalam perjalanan Mansor ada memberitahu saya bahawa dia ingin berjumpa dengan Mail. Saya kata pada dia Mail kena kerja. Dia mengarah saya untuk berjumpa dengan Mail. Saya kata kalau nak jumpa dengan Mail kena pergi kilang Mail bekerja. Selepas itu saya terus memandu kereta ke kilang Sharp-Roxy dimana Mail sedang bekerja. Setelah sampai dikilang tersebut saya berhentikan kereta berhampiran pondok telefon. Selepas itu saya menyuruh Mansor masuk ke dalam kilang dan berjumpa dengan Mail. Saya tidak mengikut Mansor kerana saya penat, sebab saya baru balik kerja. Saya tidak mematikan injin kerana saya ingin mendengar muzik. Saya nampak Mansor pergi ke pondok jaga dan masuk ke dalam kilang. Saya dapat melihat Mansor melalui cermin kereta" (see p. 125 of the Notes of Proceedings). The effect of that evidence was that Mansor had entered the enclosed area of the factory if not of the factory building itself. But when he resumed his testimony, the accused testified "Semasa saya di gari, Mansor berada ditempat pondok jaga. Mansor berada ditempat pondok jaga, sebab dia ingin jumpa Mail. Mail berada di dalam kilang" (see p. 130 of the Notes of Proceedings). In contradistinction to his earlier testimony that he saw Mansor entered the factory –"Saya nampak

Mansor pergi ke pondok jaga dan masuk ke dalam kilang" – the upshot of his later testimony was that Mansor was still outside the enclosed area of the factory.

The testimony that Mansor was at the guardhouse was made in the following context – "Semasa saya digari, Mansor berada ditempat pondok jaga. Mansor berada di pondok jaga, sebab dia ingin jumpa Mail. Mail berada di dalam kilang. Semasa saya digari, tidak ada perbualan antara saya dengan polis. Semasa saya diperiksa ditepi saya ada sebut tentang Mansor". It was the testimony of the accused that when he was frisked by SP7 he mentioned Mansor to SP7 or SP10. But it was the prior testimony of the accused that he only got to know when he was handcuffed, that there were drugs in the black bag – "Saya tidak tahu ada benda di dalam beg hitam. Saya baru tahu isi kandungan dalam beg semasa saya di gari" (see p. 130 of the Notes of Proceedings). The material contradiction was in the following. It was unchallenged evidence that the accused was frisked, then the black bag was removed from the car, and that the accused was only handcuffed after SP7 had removed the slabs of drugs from the black bag. At that point in time when the accused was frisked by SP7, the black bag and its contents were as yet inside the car. So, if it were true that the accused only got to know of the incriminating nature of the contents when slabs of drugs were taken out from the black bag, then it must follow that the accused had no knowledge of the contents of the black bag at that point in time when he was frisked by SP7. So, if it were true that the accused only got to know of the incriminating nature of the contents when slabs of drugs were taken out from the black bag, then at that point in time when the accused was frisked by SP7 the accused had no knowledge of any crime. If the accused had no knowledge of crime at that point in time when he was frisked, then there was no possible reason for the accused to mention and or implicate Mansor – "Semasa saya diperiksa ditepi saya ada sebut tentang Mansor". If the accused only got to know of the incriminating nature of the contents in the black bag when slabs of drugs were taken out from the black bag, then at that point in time when the accused was frisked by SP7 the accused had no reason to exculpate or distance himself from any crime and or to implicate Mansor, as at that point in time, if the accused were to be believed, the accused had no knowledge, as yet, of any crime. So, how could it be that the accused could have mentioned Mansor or the role of Mansor when he was frisked, at that point in time when he said he was still totally in the dark with respect to the contents in the black bag? And if it were true that the accused mentioned Mansor at that point in time when he frisked, then why had the accused, when he later handcuffed, remained all silent ("Semasa saya digari, tidak ada perbualan antara saya dengan polis") and not pointed to Mansor or mentioned Mansor, whom he said was then at the

guardhouse ("Semasa saya digari, Mansor berada ditempat pondok jaga."), to extricate himself from the slabs of drugs that belonged, so the accused said, not to him but to Mansor, when Mansor was then most conveniently there at the guardhouse for the accused to finger out?

The accused testified that during the police investigation he informed the police on the role of Mail and Mansor – "Pada 27 January 2001 dan selepas, ada soal-siasat dijalankan. Dalam soal-siasat saya ada menceritakan tentang Mail. Saya memberitahu jalan kerumah Mail. Saya ada memberitahu tempat kerja Mail. Saya juga ada beritahu tentang Mansor. Saya ada memberitahu wajah Mansor. Saya memberi statement secara lisan dan secara bertulis. Kedua-dua pun ada" (see pp. 128-129 of the Notes of Proceedings). But that story was also sprung for the first time by the accused only when he took to the witness stand. Suffice it to say that not a single question was put by the defence to the investigation officer (SP11) on the alleged oral and written statements of the accused. Suffice it also to say that not a single question was put by the defence to the investigation officer in relation to any alleged assault by the police against the accused. The accusation that SP11 assaulted the accused was made by the accused when he took to the witness stand. For some reason unknown, the prosecution chose not to rebut that accusation. Still, it could be said that contrary to what was alleged by the accused, the handwritten notes of the learned Magistrate concerned (which are in the instant court file) do not review that the accused had complained that the police had assaulted him. Anyway, the absence of rebuttal evidence could not raise a reasonable doubt in the instant case, for physical threat or physical force, while it could affect the admissibility of statements allegedly made by an accused after arrest, would not affect the truth of the alleged events that had transpired before the alleged assault.

In any event and notwithstanding the fact that the accused had not given any notice of Mail or Mansor, could there have been truth in the alleged roles of Mail and or Mansor? Mail being at the factory at the material time was clearly disproved by SP12 and SP13. But what about the existence of the person Mail? Both the accused and his sister (SD2) claimed that there was such a Mail and that they knew Mail. Both the accused and his sister were asked by the learned DPP to describe the features of Mail. Reasonably, if both the accused and his sister knew the same Mail, then they should be able to give a passably comparable but certainly not dissimilar description of Mail. Reasonably, if both the accused and his sister knew the same Mail, then both the accused and his sister should be able at least to give a passably comparable description of the major features of Mail, if not the finer features. But the accused's description of Mail, and his sister description of Mail were very different. The accused described Mail as follows. "Mail rendah sedikit pada saya, badan gempal, kulit

chocolate, rambut tidak kerinting, umur lebih kurang 33 tahun" (see p. 130 of the Notes of Proceedings). The accused said that Mail was about his height and that Mail had straight hair. His sister described Mail as follows. "Orang itu rendang kulit nya chocolate, rambut nya kerinting, umur nya dalam 30's, tinggi nya l/k dengan saya. Size badan gempal" (see p. 145 of the Notes of Proceedings). Both the accused and his sister similarly described Mail as swarthy and stout. The accused said that Mail had straight hair. But SD2 said that Mail had curly hair. Perhaps Mail could change his hairstyle. But there could not have been a change in the height of Mail, who if he were in his 30's as were said by both the accused and his sister would have attained a settled physical height. And the following was the major difference between the accused and his sister in the description of Mail. Both the accused and his sister similarly said that Mail was about their respective physical height. But the accused was much taller than his sister. In the presence of all, the court invited the accused and his sister to stand side by side. And when they did so, it was apparent to the court and it should be to all, that there was a difference of 6 inches in height between the accused and his sister. The accused said that he had known Mail for two years before 26 January 2001. So, if the accused had known Mail for that period, then he could not have slipped up on the major detail of the height of Mail. SD2 testified that she got to know Mail whilst she was a security guard at the same Sharp-Roxy factory between 1996 and 2002 – "Saya kenal Mail. Saya kenal dia semasa saya kerja di Sharp. Saya pernah kerja di kilang Sharp-Roxy daripada 1996 – 2002 … sebagai pengawal keselamatan" (see p. 143 of the Notes of Proceedings). So, SD2, who worked at the guardhouse where all employees would have to pass, would have had ample opportunity to bump into Mail and to register the physical attributes of Mail, if indeed Mail existed. Then how could it be that SD2 would recall Mail as being of her height (and SD2 was short, even for a woman), while the accused would recall Mail as being much taller? Were they describing the one and same person, if that person existed at all? Or could it be that SD2 had slipped up on the height of Mail? But SD2 was a slick witness. SD2 could give all sorts of minute details concerning the alleged day when PS31-3 was rented. Notwithstanding the fact that there could not have been any reason for SD2 to remember the details of what would not have been an extraordinary event and or extraordinary day, SD2 could say when the accused spoke to her on the rental of an available house, when she contacted the accused and then when the accused called at her house to view PS31-3, when she saw the house owner walking towards PS31-3, and when she pointed out the house owner to the accused. SD2 could even relate the specific transaction between the landlord and accused, and could even recall the precise amount of the rental and deposit. SD2 could even relate when the accused telephoned Mail, where the accused made that telephone call, what was allegedly

said by the accused to Mail, when Mail allegedly called at her house to collect the keys, and what was the alleged transaction between the accused and Mail. If SD2 could remember minute details of what to her should have been an innocuous day of some three years past (SD2 testified on 26 March 2004), then it must stand to reason that it would have been totally out of character of SD2 to slip up on the major detail of the height of Mail. So, how could it be that the accused and his sister would not agree on the physical height of Mail, if indeed Mail truly existed? And if Mail truly existed and was an employee of Sharp-Roxy, then would it not stand to reason that even if the accused did not know and or could not remember the full name of Mail, that the defence should be able to find out or uncover or fish out the full name of Mail, from the personnel records of Sharp-Roxy that could be subpoenaed, and or from SP12 or SP13? Given that Mail was raised ex improviso, that the prosecution rebutted the story that Mail was at the Sharp-Roxy factory between 10pm on 26 January 2001 to 10am on 27 January 2001, that the accused and his sister could not give an agreeable description of Mail, and that the accused who could have secured the full name of Mail but could not provide the full name of Mail, would it therefore be reasonable to accept the existence of Mail?

It must surely be unreasonable to accept that there was ever such a Mail. As said, the prosecution rebutted the story that Mail was at the Sharp-Roxy factory between 10pm on 26 January 2001 to 10am on 27 January 2001. There was no Mail who clocked in for work at 10pm on 26 January 2001. Hence, there could not be any truth in the defence story that as pre-arranged between Mail and the accused, Mail handed the house keys to the accused at the punch card station at 10pm on 26 January 2001. In view of the fact that Mail was not at the Sharp-Roxy factory between 10pm on 26 January 2001 to 10am on 27 January 2001, there could not also be any truth in the defence story that Mansor wanted to meet Mail who it was alleged was then inside the Sharp-Roxy factory and that the accused drove Mansor to the Sharp-Roxy factory to meet Mail.

The evidential burden on the accused was only to cast a reasonable doubt. That the onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution was also particularly stressed by Abdoolcader J (as he then was) in *PP v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, 216:

> It is not necessary for the defence to prove anything and all that is necessary for the accused to do is to give an explanation that is reasonable and throws a reasonable doubt on the case made out for the prosecution. It cannot be a fanciful or whimsical or imaginary doubt, and in considering the question as to whether a reasonable doubt has been raised, the evidence adduced by and the case for the defence must be viewed in at least some amount of light, not necessarily bright sunlight, but certainly not against the dark shadows of the night.

Sharma J, in *PP v. Saimin & Ors* [1971] 2 MLH 16,17, thus explained the meaning of 'reasonable doubt':

> The following definition of 'reasonable doubt' is often quoted:
>
> > It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.
>
> It has again been said that "'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there." Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

Abdul Wahab Patail J, in *PP v. Kesavan a/l Petchayo* [2001] 7 MLJ 144, in following *Miller v. Minister of Pensions* [1947] 2 All ER 372, 373, thus expounded:

> A reasonable doubt is thus not a doubt that is merely theoretically possible, but one that given all of the facts of the case is a doubt that is possible but not in the least probable. While it is always possible with a little ingenuity to create a story which raises a possible or theoretical doubt, the factual nature and circumstances of the particular case may show that such possible or theoretical doubt was not in the least probable in that case, and thus no reasonable doubt arises. If such possible or theoretical doubt is in the least probable, then the court must hold there is reasonable doubt. However, mere denial, without other proof to reasonably dislodge the prosecution's evidence is insufficient: *PP v. Ling Tee Huah* [1982] 2 MLJ 324.

According to Buhagiar J in *Saminathan & Ors v. PP* [1955] MLJ 121 and echoed by the Court of Appeal in *Lt Kol Yusof bin Abdul Rahman v. Kol Anuar bin Md Amin & Anor* [1997] 2 CLJ 752, the best definition of 'reasonable doubt' is perhaps that given by Denning J in *Miller v. Minister of Pensions*, where his Lordship said (at p. 373):

> The degree of cogency need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

But all that the accused could muster was a story that had been kept undeniably up his sleeve, a story that went against unchallenged evidence and was not consistent even with itself, and a story that was full of conflict and contradictions that would not in the end bear examination. There was no reasonable explanation.

It was submitted at the close of the entire case, by the defence that possession had not been proved. Miss Suzana Norlihan submitted, "To secure a trafficking conviction the prosecution must prove that the accused was in actual physical possession of the drugs. OKT tidak ada milikan secara physical kerana tidak ada di jumpai pada badan OKT. Juga tidak ada traces of drugs pada badan OKT. Tidak ada fingerprints. Dadah dalam kereta di jumpai ditempat belakang. The position of those things to accused in the car was agak jauh. Although OKT was found alone in the car, it could not be said that OKT was in possession. SP7 & SP10 admitted that they could not say if there were others in the vicinity. OKT kata beg adalah milik Mansor. OKT kata dia tidak pernah membuka beg tersebut. The position of accused in car and bag could not give an inference that OKT was in possession. The unexplained 'M' could have been made by the real owner of the bag. OKT kata kepada polis bahawa dadah dalam beg adalah harta Mansor, semasa OKT di periksa. The mere presence of OKT inside the car does not mean that he was in possession, even though he was in control of the car. No proof that OKT tried to take off together with the bag. Possession therefore not proved. No proof of knowledge. The prosecution relied on the attempted escapes. OKT said he only tried to retrieve the car keys and not to run. OKT never opened the bag, and did not know the contents of the bag. Running away is not consistent only with guilt. There was no proof that there was a trafficking transaction that was about to take place. Mere storing is not trafficking. It could not be said that both alleged offences were related transactions. OKT and SD2 said that Mail was the tenant. SP3 failed to say that P8C were the actual keys handed to OKT. SP3 failed to say how many keys were in the set. Prosecution witness failed to say as to which key opened the house. Therefore, there is a doubt as to whether all keys in the set could open the door of the house. IF P8C were not the keys handed to OKT, then someone else had a set of keys and therefore had access to the

house. If OKT were the only person who had access to the 3rd room, then there was no reason to lock the 3rd room and to cover the 4 slabs of drugs. Because the boxes were enlarged, how could the original brown paper had been sufficient to wrap the enlarged boxes. There is a doubt. I ask the court to look at the evidence in totality".

Well, the evidence in totality clearly said that the accused was in actual possession of the drugs in the car and in PS31-3, notwithstanding the fact that the slabs of drugs were not found on the physical body of the accused, and notwithstanding the fact, could it be so imagined that it could be so, that the accused had not tried to run off with the black bag. Traces of drugs on the hands or body and or fingerprints of the accused on the any of the slabs could only strengthen the prosecution case, but the absence thereof had not weakened the prosecution case. The accused did not specifically say that he said to SP7 and or SP10 that the drugs in the car belonged to Mansor. The accused merely testified, "Semasa saya diperiksa ditepi saya ada sebut tentang Mansor". Pada 27 January 2001 dan selepas, ada soal-siasat dijalankan. Dalam soal-siasat saya ada menceritakan tentang Mail. Saya memberitahu jalan kerumah Mail. Saya ada memberitahu tempat kerja Mail. Saya juga ada beritahu tentang Mansor. Saya ada memberitahu wajah Mansor. Saya memberi statement secara lisan dan secara bertulis. Kedua-dua pun ada". There was no evidential basis for the submission "OKT kata beg adalah milik Mansor … OKT kata kepada polis bahawa dadah dalam beg adalah harta Mansor, semasa OKT di periksa". The exact key that opened the house was not identified, but it was unchallenged evidence that P8C opened the doors of house and 3rd bedroom, and the failure of the witnesses to identify the exact key or keys was of no consequence. As for the argument that the original wrappers could not wrap the enlarged boxes, it was unchallenged evidence that the boxes were enlarged and that the wrappers were the indeed original wrappers. In any case, it was unchallenged evidence that the drugs produced in court were the actual drugs recovered from the car and house. The identity of the drugs was never challenged and never in doubt.

There is no gap in the prosecution case. There is no doubt that the accused was trafficking. The prosecution had proved that it could not have been anything else, beyond all reasonable doubt. All evaluation of the prosecution case and then of the defence gave that same result. Accordingly, on both counts, the accused is convicted and sentenced to the only punishment mandated by law, and that is, to be hanged by the neck till he is dead.